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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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SODERHAMN MACHINE MANUFACTURING  
COMPANY, a corporation,

*Appellant,*

v.

THE MARTIN BROS. CONTAINER &  
TIMBER PRODUCTS CORP., a corporation,

*Appellee.*

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**APPELLEE'S BRIEF**

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*Appeal from the United States District Court  
for the District of Oregon*

HONORABLE WILLIAM G. EAST, Judge

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FILED

FEB 28 1968

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**JURISDICTIONAL STATEMENT**

Appellee hereby accepts and adopts the jurisdictional statement of Appellant's Opening Brief.

**STATEMENT OF THE CASE**

For a fuller understanding of this appeal we deem it desirable to supplement Appellant's Statement of

the Case and to present some corrections thereto. For convenience we will refer to Plaintiff-Appellant as Soderhamn, and to Defendant-Appellee as Martin.

In 1961, Martin, operating, at Oakland, Oregon, a plywood plant and sawmill, decided to add to the existing plant a log debarking system, and a chipper system to convert waste wood products into marketable chips. Negotiations for installation of these systems were entered into with equipment manufacturers, including Soderhamn and McManama & Co., of Seattle. In April, 1961, Soderhamn prepared a schematic drawing of a portion of a proposed installation, identified in the list of exhibits as Exhibit 122. In May, McManama & Co. presented to Martin a proposal (Ex. 401) for a Core Chipping System and a Barker System, and for modification of an already existing Veneer Chipping System at the Martin plant. Later McManama & Co. quoted an additional cost for steel piling and steel substructure of \$26,732 (Ex. 404). In July Soderhamn submitted a proposal for installation of a complete Log Debarking-Chipping System with all components necessary for a completed plant (Ex. 100). This proposal, together with a supplemental letter wherein Soderhamn designated McManama & Co., its sub-contractor, became the contract for the installation of the systems.

The contract estimated that approximately six months would be required to complete the entire installation (Ex. 100). McManama & Co., the subcontractor for Soderhamn, as work on the installation

progressed, became enmeshed in financial difficulties (Tr. 1486; Ex. 902, p. 5). At one stage of the work Soderhamn was required to assume the McManama payroll (Exs. 529, 530, 532). Martin was given notice of a mechanic's lien for \$10,721.64 (Ex. 604) and Soderhamn had to assure Martin (Ex. 609) that Soderhamn would protect the Martin property from any liens arising through McManama's financial difficulties. The Comptroller of Soderhamn expressed his opinion to Martin that McManama & Co. had "hood-winked" Soderhamn (Ex. 534).

The work was not completed in the expected six months, nor within a year, but dragged along until September 1962, when McManama & Co. left the job, with some of the work not completed and with much of the work poorly and inadequately done.

On October 1st, 1962, Martin by TWX informed Soderhamn (Ex. 689) that Martin was, as of the following day, starting with completion of the installation with outside help, and would charge the expense back to Soderhamn.

A general description of the systems to be installed by Soderhamn may be appropriate at this point.

The Barker system was intended to debark logs, cut them to suitable lengths, and deliver them either to the mill pond, or, for sinker logs, to a point on solid ground near the mill pond. This operation necessarily generated large quantities of debris in the form of splinters, pieces of bark, sawdust, and the like. This

debris was to be gathered constantly from all parts of the Barker system into conveyors and transported into a Hog which chewed the pieces to proper size. The hogged material was then to be delivered, by means of a pneumatic blowing system, to fuel bins adjacent to the steam generating plant on the premises.

The Chipper system was intended (1) to chip up the cores of logs, from which the recoverable veneer had been stripped, into chips, and to transport the chips into a chip bin by means of a pneumatic blowing system, and (2) to pick up slabs and other debris from the sawmill, separate the chippable material from waste material by means of a shaker roll, chip up the chippable material in a horizontal Chipper and deliver the chips to the chip bin.

As Appellant's Brief states (p. 22) Soderhamn is essentially a manufacturer of machines. Among the machines furnished under the contract were the Hog above mentioned, and a Core Chipping Machine, of Soderhamn manufacture, which were well made. The story which respect to the De-barking Machine which Soderhamn attempted to supply is entirely different.

By the contract (Ex. 100, p. 9) Soderhamn agreed to furnish a 60" Soderhamn Debarker, with electric starters and controls and console, approximate shipping date five months from receipt of order, for which there was a specified price of \$81,500.00.

The Debarker was not manufactured at any plant of Soderhamn, but a Portland machinery company was engaged to build it (Tr. 77). No Debarker of the

type and size was in existence and none had ever been built before by Soderhamn (Tr. 77). The rotor was to be operated by means of a ball-bearing device, for which the balls and races were to be supplied by a German concern (Tr. 76). Manufacturing difficulties and delays were encountered (Exs. 437, 455).

Difficulties in attempted operation were even worse. We have summarized some of these difficulties in the attached appendix.

We will discuss the contentions of the parties and the findings of the Court as regards the Barker, as well as the objections of Appellant to other findings of the Court, in connection with Appellant's specifications of error.

As Appellant states (Br. p. 7-10) Martin claimed in the pre-trial order that Soderhamn had failed in the performance of its contract with Martin in some nineteen particulars. During the course of the trial and in examination of the multitudinous exhibits received it was made to appear that the claim of Martin in some respects could not properly be sustained.

Examples of these contentions are that a fair construction of the contract will not justify a requirement that Soderhamn supply a slasher saw. For another instance, a claim for loss of chip revenue could not be sustained for the reason that the core chipper was operating and producing chips even though the Debarker was inoperable. Also in the assembly and sorting of the large number of invoices and other documentary material relating to costs there occurred some duplication of charges.

In carefully prepared briefs after an exhaustive study of the transcript of testimony and of the many exhibits, any pre-trial contention claim not fully proved to be meritorious and all duplications of charges were eliminated. As Appellant puts it in the brief (p. 12) "Defendant thus abandoned claims totalling about \$84,000."

The Findings of Fact, as finally entered by the Court, eliminated all portions of the Martin contentions of the pre-trial order so "abandoned," and embraced only credits and counter-charges of Martin fully proved at the trial, and only in amounts fully sustained by the evidence. The details will be covered in discussion of Appellant's Specifications of Error to which we now turn.

### **ARGUMENT ON SPECIFICATIONS OF ERROR 1, 2 and 3**

In this action jurisdiction is based on diversity of citizenship, and we assume that the Oregon law is pertinent, if not controlling, on the question of how far an appellate court may go in upsetting the findings of a trial court in a case tried to the court without a jury.

In a case tried to the court without a jury, it is not the function of the appellate court to review the evidence, and the finding of the trial court is final if there is any evidence in the record to sustain the finding. *Brownsville Particle Board v. Overhead Door Co.*, 244 Or. 424, 417 P.2d 1019 (1966).

Where a question of fact is to be determined and

the court has found the fact in favor of a party, the appellate court has no power to disturb the finding. *Hunt v. Ferguson-Paulus Enterprises*, 243 Or. 546, 415 P.2d 13 (1966).

In a law action tried by the court without a jury the findings of the court have the force and effect of a jury verdict and must be affirmed on appeal if supported by any substantial evidence. *Kuzmanich v. United Fire and Casualty Co.*, 242 Or. 529, 410 P.2d 812 (1966).

The findings of the trial court may not be set aside upon a "weighing" of the evidence. *Gordon Creek Tree Farms v. Layne*, 230 Or. 204, 358 P.2d 1062, 368 P.2d 737 (1962).

The rule is the same under Rule 52(a) of the Federal Rules of Civil Procedure. In *Cataphote Corporation v. De Soto Chemical Coatings*, 356 F.2d 24 (1966) this Court said:

"It is not our function to reevaluate the evidence presented below. We can not substitute our judgment for the first-hand evaluation made by the trier of fact. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure our obligation is to determinine if the findings below were 'clearly erroneous.' This statutorily imposed standard does not vest us with power to reweigh the evidence presented at trial in an attempt to assess which items should and which should not have been accorded credibility. Our task, rather, is to determine if there exists evidence of substance to support the findings of the trial court."

With these rules in mind we will now consider the findings of the trial Judge to see if they are supported in each instance by any substantial evidence.

### **Barker Foundation Structure**

The erection of the barker foundation structure, originally scheduled as a first item of construction, was postponed for other work under the contract. This is important only insofar as the financial condition of the subcontractor worsened as the work progressed, and likewise the quality and integrity of the work.

The subcontractor abandoned the work on September 21, 1962. The barker foundation structure had then been subjected to the stress of intermittent operation of the log haul and barker since the last day or two of June. On October 1st Martin sent to Soderhamn a teletype stating “. . . Martin Bros. are as of Oct. 2nd starting completion with outside help. Same expense to be charged your account” (Ex. 688).

Sutherlin Machine Works, Inc. was called in and did the remedial work necessary to put the structure in shape to sustain the operation. The condition of the structure prior to completion of the remedial work was fully described by a number of witnesses.

Witness Halverson, of Sutherlin Machine Works, said that what caught his eye was the excessive movement of the structure while the unit was in operation, and, that while he was watching, an electrical

relay was knocked out (Tr. 336-7). To him it was quite apparent that there was misalignment of bearing setups, and the primary consideration was to eliminate "excessive sway during the debarking operation" (Tr. 405).

Witness Jones told that when larger logs were being pulled up the log haul, "it would shake tremendously and in short jerks . . . until you would wonder if the thing was going to stay in place" (Tr. 452).

Witness Kemp found excessive vibration from the log haul structure transmitted to the barker structure and over into the saw deck, which later was eliminated by the bracing, gusseting, and welding done by Sutherlin (Tr. 649), before which remedial work "if a heavy log would be kicked out, there would be such a vibration over the saw deck that it would kick out the relays for the saws, for the hog" (Tr. 650).

Witness McManama, "observed movement, I observed a sway of the entire structure, and I certainly observed vibration when a log would go across from the flue (sic) to the feed rolls" (Tr. 1383).

Witness Tozier, working for Sutherlin in the remedial work, was asked in cross examination for an explanation of the lack of welding, and explained, "they just didn't get back to it and weld it after it was built" (Tr. 278).

The summary (Ex. 921) of Sutherlin Machine Works shows that they found in the Log Haul, Barker, Transfers and Saw Deck Structures:

Total ft. broken weld .....	432
Total ft. $\frac{3}{8}$ single pass weld .....	1966
Total ft. tack weld .....	851
Total ft. no weld .....	1055

To complete the structure 3,496 feet of  $\frac{1}{2}$  x  $\frac{1}{2}$  re-welding and 868 feet of  $\frac{3}{8}$  x  $\frac{3}{8}$  rewelding was done. Gussets and braces were added. On the Log Haul portion there was found 109 feet of "no weld" and 80 feet of broken weld. Gussets and braces were added, and 552 feet of reweld was done (Ex. 921).

The necessity for this work is beyond question. The finding as to this item is fully supported by evidence.

This is in effect conceded by Appellant (Brief p. 30) by the charge that Martin made no effort to mitigate its damages. This duty to mitigate was never made any issue in the pre-trial order, however, as the Appellant chose instead to contend that Appellant had fully performed (R. 11).

There was, it is true, some confusion as among the various exhibits, due to the fact that so many witnesses and attorneys handled them at the time of trial. There was, however, no confusion as to the charges assigned to the different pieces of remedial work, as made by the trial Judge in the findings.

For the barker structure the cost of the work by Sutherlin, for labor and materials, was \$11,580.85 (Sutherlin invoices D 1626, 1375, 1428, 1410, 1144, 1271, 1271-A, 1141, 1141-A, 1141-C, 1302, 1302-A,

1302-B and 1622) and, as shown by Martin time cards, Martin supplied labor of \$28.88, making a total cost of \$11,609.73. The testimony of Mr. Kemp and Mr. Halverson, both experienced in such matters, was that this was a reasonable figure.

The finding of the trial Judge as to this item was sustained in all respects by substantial evidence.

### Log Haul

As installed by Soderhamn the Log Haul, intended to convey logs from the mill pond up onto the infeed conveyor on the barker structure, was practically inoperable.

The down time summary (Ex. 924-B) shows:

- 6-28-62 Chain hung up—7 hours down
- 6-29-62 Log Haul being repaired all day
- 7-13-62 Log Haul Chain jumped off return rails two times
- 7-14-62 Log Haul Chain off return three times
- 7-16-62 Log Haul Chain off drive
- 8- 3-62 Log Haul fell off return and tore it apart
- 8- 6-62 Crooked log hung up in log conveyor twice
- 8- 8-62 Big log stuck in saw trough—knotty log had to be bucked on log haul
- 9- 4-62 Log Haul hung up and broke
- 9- 8-62 Log Haul chain came off sprockets
- 9-14-62 Log Haul chain off drive and return
- 9-17-62 Log Haul chain off drive sprocket and return

9-21-62	Log Haul off twice
9-25-62	Log Haul off return
9-27-62	Log Haul off return
10- 4-62	Log Haul off
10- 5-62	Log Haul jumped off and hung up— two links broken and had to be welded
10- 8-62	Log Haul off
10- 9-62	Log Haul chain jumped off return seven times

Soderhamn admits the making of some changes in the system to make it operable (Br. 34) and that Sutherlin, after McManama left the job, “made a change in the drive system to an S-drive” and did some other work (Br. 34). The work done to make the Log Haul operable, consisting of the addition of a suitable tension system, or “S” drive, the installation of heavy return rails and incidental work, was fully described by the witnesses Halvorsen and Kemp, and these witnesses also testified as to the reasonableness of the charges. The cost of this work was \$2,963.25 (Sutherlin invoices D 1201, 1201-A, 1201-B, 1201-C) plus \$5.78 in Martin labor. The trial judge found on substantial evidence that the reasonable and necessary cost, in labor and material, to make the Log Haul conform to the contract was \$2,969.03.

### **Kickers and Kicker Shafts**

The system to be installed by Soderhamn included a conveyor to take the debarked logs to a series of saws. The logs, after being cut into suitable lengths,

were then "kicked" into the log pond or, for sinker logs, in the opposite direction to a sinker deck. This kicking was to be done by a series of steel arms activated by the turning of a shaft held on the barker structure by bearings.

Although the contract contemplated completion of the entire system in six months, or thereabouts, it was not until about the first of the following July after the signing of the contract that this portion of the system was ready for operation (Ex. 924B). Then in a few weeks time the kicker shaft, because of insufficiency of size, quality of steel and number of supporting bearings, became practically inoperable, and the kicker arms bent out of shape and became useless (Tr. 211).

Mr. McManama attempted to excuse this sort of kicker arms by explaining that breakable arms were desirable to train an inexperienced operating crew (Tr. 1396).

Soderhamn was advised that the shaft that activated the kickers had to be changed (Ex. 718).

To make the kicker system operable the shaft was replaced with a shaft of larger size and better quality steel. The structure was reinforced, and additional bearings for the shaft installed. New kickers of better steel, capable of doing the work, were installed. Sutherland invoices 1559, 1615, 1368, 1368-A, 1306, 1306-A, 1365 and 1241, totalling \$5,392.25, and Martin time cards for \$53.13 labor and Northwest Machinery Sales invoice for \$35 cover the cost of the work.

Again the finding is supported by substantial and convincing evidence.

### **Steel Decks, Walkways and Stairways**

As Appellant states (Br. 38) with reference to the decks, stairs and walkways of the barker structure, "The matter of the materials to be used for walkways and deckings simply is not mentioned" in the contract. Neither, for that matter, are walkways and stairways themselves in the contract between Soderhamn and its sub-contractor, McManama & Co. (Ex. 522). But no dispute ever arose over the necessity for decks, stairs and walkways in a completed and functional structure. The Court found that they should have been constructed of steel instead of wood. Initially a structure of treated piling and timber caps was proposed (Ex. 401, p. 2). By phone a quote for the additional cost of a steel structure was asked for, and McManama & Co. quoted an additional cost of \$26,732 for steel substructure, including (not consisting of) steel piling, x-bracing and caps (Ex. 404). The only mention of wood in the contract is in connection with the frame of the galvanized sheet metal building on the barker structure and the frame of the galvanized sheet metal building on the chipper assembly. The wood frames were eliminated by appropriate change orders (Exs. 111 and 117) and the additional cost was paid by Martin, and there is no dispute about this. A steel structure was the subject of the correspondence, with its additional cost, before the contract was signed. No material was specified

for the walkways, stairs and deck. The trial Judge was justified in finding that steel was contemplated and should have been supplied.

If ambiguous with regard to the material for decks and walkways, the contract should be construed, under familiar rules of construction, against Soderhamn, the party preparing it. *Quillin v. Peloquin*, 237 Or. 343, 391 P.2d 603; *Cimarron Ins. Co. v. Travelers Ins. Co.*, 224 Or. 57, 355 P.2d 742.

### **Pits Under Hog, Surge Bin and Feeder**

As to the necessity for this part of the installation there is no dispute whatever. Appellant's brief (pp. 44-5) concedes the need for these pits.

The contract clearly called for a bark conveyor to carry the bark and other debris from the barker to a surge bin at the edge of the pond; for a surge bin to receive this bark and debris and meter it to the adjacent hog; and for a system to meter the hogged material to a pneumatic system for transport to fuel system (Ex. 100, p. 27).

At the elevation at the edge of the pond at which McManama & Co. by its own choice established this installation, it was necessary to encase the area in what is described as pits under the hog, in order to provide space for the removal of debris and for the maintenance of the conveying equipment (Tr. 659, 1291, 1494).

Soderhamn refused to make this installation as

a part of the system called for by the contract, and Martin was required to put in the pits, at a reasonable cost of \$1,833.10.

The finding of Judge East as to this item is amply supported by substantial evidence.

### **Sheer Aprons or Plating**

Soderhamn seeks to avoid responsibility for the reasonable cost of putting steel plating to cover the area over which logs travel from the outfeed conveyor to the left and into the pond, on the ground that the original contract called for only knees to be installed in that area. We respectfully submit that the contract does not so provide.

The contract does provide for the installation of a complete and operable log debarking system. The schematic drawing (Ex. 122) which was prepared to show the general layout proposed by Soderhamn was not incorporated into the contract. Nor was it ever intended to place a limit upon the work and material necessary for a "complete log debarking-chipping installation," or "a completed plant," or a "complete installation" (Ex. 100, p. 1).

Mr. McManama admitted (Tr. 1459-1462) that without the protection of steel plating over this area logs of tremendous weight could fall into and damage the hydraulic piping and valves and electrical conduits underneath the area.

Of the necessity of this work there is no question.

No evidence was offered that the charges for the work, represented by Sutherlin invoices D 1144-A-1 and 1144-B-2, totalling \$2,758.16, was unreasonable. The finding of the trial Judge as to this item was supported by substantial evidence.

### **Bark Refuse Conveyors**

Devices were of course necessary to pick up the bark removed from the logs, the sawdust originating with the sawing of the logs, and the other debris generated in the barking-sawing operation. The devices, as installed by Soderhamn, failed to pick up this debris and convey it to the hog. Bark piled up and interfered with proper functioning of the log haul (Tr. 1381, 1599; App. Br. 34). Mr. Kornberg, West Coast Manager of Soderhamn, found an accumulation of waste under the head shaft of the conveyor to the "haul" [sic—Hog] (Tr. 107).

The gathering up, hogging and conveying to burner of essentially all the waste material originating at the barker structure was obviously a necessity in any complete system. To complete the system, so far as pick up and disposal of bark and sawdust waste was involved, Martin was compelled to and did extend the conveying system, at a cost (never contended in any respect to be unreasonable) of \$4,736.96. The finding of the Court was fully sustained by the evidence.

### Shrouding

To guide the waste material into the conveyors at the barker structure shrouding was necessary. This meant the use of plate or sheet steel sheers to provide protection against spillage (Tr. 144). Soderhamn had not provided sufficient shrouding (Tr. 214) and Sutherland completed the shrouding installation at a reasonable expense of \$1,917.06. The pre-trial contention figure was \$2,975.47, (R. 15), but the trial Court eliminated the item of replacing sawdeck plates of which Appellant is now complaining (Br. 51). The figure found by the Court was proper and reasonable and should not be disturbed on this appeal.

### **Saw Deck—Log Lifts—Modification of Structure— Sinker Deck Drive—Roof Over Saws**

Contention 6 of Martin in the pre-trial order (R. 15-16) had to do generally with that portion of the structure supporting the log sawing operation; the lifting and sawing of logs; and their transfer to sinker deck. It was found necessary in order to make an operable system to strengthen and modify the structure; to put guides to keep the lifting pins, used to lift the logs to be sawed, in place; to install an additional pair of lifts; to rearrange the drive for the sinker log operation; and to provide a lean-to type of roof over the saws and their operators. Also, discussed above, there was involved the placing of shrouding in such locations as to channel the sawdust into the conveyors to the hog.

As to the log lifts portion of this contention, no dispute exists but that the contract provided for a complete set of lifts for each saw, each to be operated by heavy duty hydraulic cylinders with all controls (Ex. 100, p. 11; App. Br. 53). Soderhamn contends (Br. 53) that a complete set of lifts for each of four saws means four pairs of pins. From abundant evidence the Court found otherwise. A log lifted up in the air to be sawed, if sawed with one saw, needs a lift at each end; if sawed with two saws, needs three lifts; and so forth. The evidence left no doubt but that an additional pair of lift pins was required, and that the lift pins needed guides which Soderhamn failed to supply (Tr. 217, 915).

As concerns the sinker deck modification, a \$56.00 item, the evidence supporting the necessity for this is clear. Logs which would sink if kicked into the pond were to be transferred to a point where they could be picked up by a lift truck and transported to the lathes. The transfer chains are activated by a drive sprocket. This sprocket was so placed that the forks of the lift truck were likely to hit it (Tr. 918-9). The sprocket was relocated so as, in the words of Appellant's Brief (p. 54), "not to have this drive unit exposed as much as it was previously."

A lean-to type of building over the saws, to protect the operators as well as the saw mechanism, was an obvious necessity as part of a complete system. Soderhamn had planned to put in a small lean-to type of cover (Tr. 113). The literature submitted in con-

nection with the installation showed a roof over the saws (Ex. 919). The Court found that the contract provided for a roof over the saws. A construction cost of \$1,161.00 for the roof was quoted by McManama (Ex. 561). Martin determined that a 4 foot extension was desirable and that the additional cost would be assumed by Martin. The total cost of the roof, with the extension, was \$2,543.59, which is the amount contended for in the pre-trial order (R. 16) and which McManama testified was reasonable cost. Since it appeared at the trial that Martin had assumed the additional cost of the extended structure, the trial Court in the findings limited the recovery for this unsupplied item of the contract to the earlier quoted figure of McManama of \$1,161.00.

Sufficient and convincing evidence was before the court in connection with this contention 6, and no reason has been shown for disturbing the findings of the Court.

### **Hydraulic System**

That the hydraulic system, as installed by Soderhamn, required corrective work, because of breakage due to lack of flexible connections, has not been questioned (Kornberg Tr. 114, 115; McManama Tr. 1389, 1391). There is substantial evidence that the necessary corrective work had to be completed after the subcontractor left the job (Tr. 369). Due to the defective condition of the system and the breaking of the pipes some hydraulic oil was lost, and had to be replaced by more oil, after Sutherlin Machine had made

the system operable. In the pre-trial contentions the cost of this replacement oil was included; in the findings of the trial Court its cost was eliminated.

In its brief Soderhamn complains that Martin repaired the "subsequent difficulties without giving notice to the contractor of intention to do so" (Br. 57). This overlooks, however, the teletype of October 1st, Exhibit 688, and also the subsequent dozens of communications in the record.

The finding of the trial Court as to the hydraulic system is fully supported in the record.

### **The Debarker**

The difficulties with the debarking machine we have set forth in some detail in the attached appendix. Appellant concedes that the debarker without doubt "gave trouble" (Br. 58).

The correctness of the finding of the trial Court, that Martin was entitled to return of the money paid for the machine, is said by Appellant to be, however, "dependent upon Martin's showing that the seventh bearing failed" (Br. 65). There had occurred six previous bearing failures, admitted by Appellant. The proof of a seventh failure was practically conclusive. The growling of the machine; the metal shavings in the lube pump (Ex. 924-B); the repetition of all the symptoms of the previous failures; and the condition of the races as found and photographed by the Metallurgist, Czyzewski (Ex. 922) all prove overwhelmingly the occurrence of a bearing failure for the sev-

enth time. So, assuming that on this narrow ground, only, the return of the money paid for the machine would be proper, the proof fully sustained the finding.

But the Appellant argues (Br. 67) that if the debarker was defective, as it admittedly was, Martin's damages should not exceed the cost of the machine less a reasonable allowance for the value of the use made of the machine. The difficulty with this position is that Appellant made no contention and offered no proof as to any such reasonable allowance, but contended on the other hand that the parties agreed for their mutual benefit for the return of the barker for resale with credit to Martin only for the net on such resale (Contention 3, pre-trial order—R. 11). As to this contention no proof of such agreement was offered and the Court had no basis for any finding respecting such agreement.

The machine presented endless difficulties. It was finally taken away from the Martin plant by Soderhamn, and no substitute machine was offered to take its place. The trial Court was clearly right in finding that Martin was entitled to recover from Soderhamn the price paid for the machine.

There was some evidence by Martin, denied by Soderhamn, that Soderhamn promised to replace the barker with a Nicholson barker if the one installed did not perform satisfactorily. This promise, however, was not placed in the contract as signed. It therefore appears that the parties entered into a contract, one item of which was that Soderhamn would supply to

Martin a 60" Soderhamn Debarker, for which Martin was to pay \$81,500.00; that Soderhamn made only a temporary delivery of an admittedly deficient article, and removed the same from the Martin plant at Oakland and disposed of the same to others; that so far as this item is concerned, Soderhamn failed completely to perform; and that Martin is entitled to credit against the total contract price for the specified price of this item.

**Barker Removal—Barker Building—Labor  
Furnished By Defendant**

The principal objections offered by Appellant to the findings of the trial Court on these three items seems to be that the Court, having refused to strike the testimony of Raymond Martin from the record, considered his testimony of reasonable value as credible. There is no doubt—indeed much of it is in the agreed facts in the pre-trial order — but that the barker caused difficulties in start up, in being taken apart for repair, in being lifted out to be taken to Portland to be re-machined, and in being removed from the barker structure to be taken from the Oakland plant for reconstruction and resale. Some of the details as to the costs incurred were the subject of testimony by Mr. Martin. The details, with supporting invoices, are given in the appendix. As to Raymond Martin's testimony concerning the Martin labor charges, Appellant admits his competency (Br. 97). The reasonableness of the other charges was the subject of testimony by Mr. Halverson, Mr. Kemp and others. Soderhamn chose not to submit any evidence

as to reasonable value to contradict or lessen the value of the Martin evidence on these items. There plainly is no merit to the specification of error as pertains these three items.

### **Console**

This item, amounting to \$422.90 reasonable expense in placing the operator's console in a relatively safe place, hardly merits the Court's attention. Appellant says "No one disagrees the console had to be moved" (Br. 72). Appellant claims that the dangerous place where it was installed originally was at Martin's demand, but Exhibit 637, a letter of Soderhamn's Mr. Kornberg, dated August 2, 1962, says that "it was our Mr. Hill who recommended that the panel be mounted in its present position." The trial Court made no mistake in the finding respecting relocation of the console.

### **Conveyors to Hog**

That the conveyor to carry the bark and sawdust to the hog, as installed by Soderhamn, was not capable of sustained successful operation, was amply demonstrated by the testimony of a number of witnesses: Halverson, Tr. 372-3, 417; Jones, Tr. 453; McManama, Tr. 1399, 1402. The "problems Martin had with this conveyor" (App. Br. 73) are in effect admitted by Soderhamn, but are blamed upon the fact that a shortening of the distance from the barker structure to the hog from 80 feet to 67 feet (Br. 73-4), allegedly occurred. Assuming, however, that the hog was

located some 13 feet closer to the barker structure than had been expected, there is no provision in the contract penalizing Martin for so locating the hog; and there is no showing that Soderhamn's subcontractor suggested to Martin that the work of installing a conveyor of shorter length or different grade affected in any way the difficulty or the cost of the installation. No request for any change order appeared. No objection by Soderhamn or McManama to the place where the hog was installed appears in the record.

Much complaint is made of the reasonable cost of the remedial work done. Appellant produced two expert witnesses, Kintz and Wahl, to testify that the cost was unreasonable. Neither of them had spent more than a few minutes at the Martin plant at Oakland. Three witnesses for Martin (Halverson, Raymond Martin, Kemp) gave opinion evidence that the actual cost of \$14,063.02 was reasonable. They were all three on the job, so to speak, and had more familiarity with the difficulties than the witnesses for Soderhamn.

The trial Court found that the remedial work was necessary and that the reasonable cost was the amount testified to by these three witnesses. There is no basis for disturbing this finding.

### **Horizontal Chipper Feed System**

This system was intended to separate chippable material from the sawmill refuse enroute to the burner, convey the chippable material to and into a horizontal

chipper, and drop the remaining refuse into the conveyor to the burner. The separation was to be made by what is described as a shaker roll.

As installed by Soderhamn the system failed to get the refuse to the shaker roll (Tr. 125; see also description page 81 Appellant's brief). Then the shaker roll did not make the necessary separation, but a great deal of chippable material went to the burner (Tr. 219, 305, 377). Then the chippable material was not conveyed to the chipper because of "misalignment of the system" (Tr. 377) which was installed in a zig-zag fashion, the longer pieces of wood being unable to travel around the bends and angles. This in turn required constant employee assistance to keep the material moving. The required remedial work was described by Mr. Halverson:

"We rebuilt the shaker roll so it would pass chippable material on to the chipper. We also put in a belt conveyor ahead of the shaker roll to permit chippable material to be fed from that conveyor to the shaker roll without dropping through. We realigned the conveyor that fed the chipper and repositioned the chipper so it was in more true alignment with the conveyor." (Tr. 377).

This work was found necessary by the trial court, and the cost of the modification was found reasonable.

Appellant complains that Mr. Halverson, in testifying as to reasonable value included in his estimate the amounts contained in Sutherlin invoices D 1785,

D 1871-A and D 2135, which covered other work. These invoices came to the sum of \$756.17. This sum was deducted by the trial court from the amount claimed in the pre-trial order contention relating to this item, giving a net reasonable cost for the remedial work of \$9,531.57. No basis exists to disturb the findings of the trial Court.

### **Roof Over Belt**

One of the items of the Sawmill Chipper and Chip Loading System to be installed was "A chip conveyor to receive chips from the above cyclone and transport them approximately 80' to the adjacent 30-unit surge bin. This conveyor to consist of an 18" belt . . ." (Ex. 100, p. 29).

This conveyor was installed in such manner that the chips had to ride up in a steep incline on the belt to the top of the surge bin. The incline was so steep that when in rainy weather the belt became wet and slick, the chips would not adhere and be transported to the surge bin. To cure this insufficiency the belt was put under cover at a cost of \$558.10. The contract clearly called for a system that would transport the chips to the bin, and to make a system that would transport chips as they developed, rain or shine, the roof was necessary, and the cost was reasonable, as the trial Court found.

### **Chip Blower System**

As Appellant states (Brief p. 83) there were three separate pneumatic blower systems installed under

the contract, and two operated satisfactorily. Appellant further states (Brief p. 84) that the contract unmistakably called for the installation of a pneumatic system which would so operate as to convey the chips originating at the core chipper and the chips originating at the veneer chipper to the chip control center. This (third) system admittedly did not operate satisfactorily, but was constantly plagued with what Appellant describes as a "plugging problem" (Br. p. 84). Many suggestions were made as to means for curing the plugging problem, including the suggestion that Martin put the cores into the system as they developed (Appellant's brief p. 85), but the system would not and did not work until redone by Martin after the subcontractor, McManama & Co., walked off the job. The trial Court found on satisfactory evidence that the remedial work was necessary and the cost reasonable.

### **Brushes to Clean Belts and/or Chains**

It was an obvious necessity, in a complete installation, to have the belts and chains, which convey chips, bark and sawdust, operate without having the material adhere to the belt or chain and ride around and around the circuit. McManama & Co. left the job site with many unfinished items, including the placing of brushes where needed to clean the belts and chains and thus prevent this condition. Mr. Kornberg, of Soderhamn, observed "that a certain amount of spillage was occurring because of the lack of brushes" (Tr. 128-9). The number, location and ne-

cessity for the brushes was described in detail by Kemp (Tr. 737). The Court found that they were a necessary item in an operable system, and that the cost of installing them, in the sum of \$941.38, was reasonable.

### **Miscellaneous Charges—Insurance**

The contract plainly provides (Ex. 100, p. 3) that the Contractor's (Soderhamn's) standard all risk insurance policy covering the installation is included in the contract price. The supplemental letter states that this part of the obligation of Soderhamn will be performed by McManama, who will furnish an all risk insurance policy which will be included in the contract price. The contract, page 3, provides that this insurance coverage will be continued until completion of the individual systems and required adjustments are made.

The proof showed without contradiction that before the completion of the installation the all risk insurance was cancelled (Ex. 738; Tr. 1012) and that Martin secured insurance protection, first by obtaining a floater at a cost of \$410.00, and then, for the succeeding period until November 20, 1963, by securing an indorsement to its insurance policies, covering barker, motor and gear set on barker (Tr. 1265), at a cost of \$1,302.81. Since all risk insurance under a policy to be supplied by Soderhamn was included in the contract price, and since it was not furnished by Soderhamn for a portion of the period but was furnished by Martin, the cost of the insurance

is a proper countercharge in the sum of \$1,712.81. Mr. Ahl, Insurance Underwriter, gave the details of the coverage and of the cost (Tr. 1262-1268). No proof was presented that either the coverage or the premium cost was excessive or unreasonable.

There is no substance to the Specifications of Error 1, 2 and 3 of the Appellant. It is admitted that there was evidence to support the findings of fact (Br. 15). All that Appellant asks is that this Court reevaluate the evidence. The authorities both of the Oregon Supreme Court and of this Court which we have mentioned above make clear that this Court should not do so.

#### **SPECIFICATION OF ERROR NO. 4**

The Appellant, Soderhamn, contending that controlling Oregon law does not permit interest in the circumstances of this case, specifies as error on the part of the trial Court the inclusion in the judgment of interest from January 1, 1964, on the amounts found due to Appellee.

This Court, in the case of *Lundgren v. Freeman*, 307 F.2d 104 (1962), has well stated the Oregon law relating to pre-judgment interest, in cases of breach of contract, as follows:

“Under ORS § 82.010(1)(a), money is ‘due’ when there is a wrongful withholding of money, the amount being either ascertained or ascertainable by simple computation or reference to recognized standards (E.g., Public Market Co. of

Portland v. City of Portland, 1943, 171 Or. 522, 130 P.2d 624, 138 P.2d 916; Northern Pacific R. Co. v. Twohey Bros. Co., 9 Cir., 1938, 95 F.2d 220; Northern Pacific Construction Co. v. Wallowa County, 1926, 119 Or. 565, 249 P. 1100). The theory is that the party in breach should compensate the injured party for wrongfully withholding from him the use of an easily ascertainable sum of money after the due date. (Public Market Co. of Portland, *supra*, 1943, 171 Or. 522, 130 P.2d 624, 138 P.2d 916, 918-919; Northern Pacific R. Co. v. Twohey Bros. Co., 9 Cir., 1938, 95 F.2d 220, 226)."

The leading case of *Public Market Co. v. Portland*, 171 Or. 522, 130 P.2d 624, 138 P.2d 916, involved a breach of contract by the City of Portland. The Court determined that there had been a breach, that plaintiff was entitled to recover damages for such breach and that plaintiff "therefore, is entitled to recover the difference, if any, between the contract price and the reasonable market value of the land, building and equipment at the time of the breach" (171 Or. at 591). Upon a rehearing, the allowance of pre-judgment interest having been challenged, the City having contended that since the damages were unliquidated they were not moneys due within the meaning of the statute, the Court (171 Or. 623) held that its previous case of *Northern Pacific Construction Co. v. Wallowa County*, 119 Or. 565, 249 P. 1100, governed, and was "unquestionably authority for the allowance of interest on unliquidated damages growing out of the breach of a contract."

The Court further said that *Northern Pacific R. Co. v. Twohey Bros. Co.*, 95 F.2d 220, wherein it was held that on breach of contract "any lack of liquidation of damages" would not defeat the right to interest, had been correctly decided.

The rule of these decisions has recently been applied in an admiralty case by the District Court of the United States for the District of Oregon. In *Cia. Estrella Blanca v. S. S. Nictric*, 247 F. Supp. 161 (1965), Judge Kilkenney held:

"Recognizing that *Public Market Co. of Portland v. City of Portland*, 171 Or. 522, 625, 130 P.2d 624, 138 P.2d 916 (1943), was not a proceeding in admiralty, I am of the belief that the thorough analysis of the subject of interest and the principles there stated, though not controlling, are highly persuasive. The rule stated is equitable, whether employed in admiralty or at common law."

In *United States v. Hanna Nickel Smelting Company*, 253 F. Supp. 784 (1966), Judge Solomon made a determination of the amounts payable on overpayments in unliquidated amounts and allowed interest from dates of overpayment, stating:

"This is a classic case of unjust enrichment. From the dates of overpayments, the Company has had the use of the Government's money. The amounts of the overpayments, as well as the dates, have always been subject to ready calculation, once the existence of a breach was determined" (253 F. Supp. 796).

In the present case Judge East determined that the amounts involved were ascertainable by computation and reference to recognized standards, and that therefore interest was properly allowable from due date rather than date of entry of judgment.

Indeed for a large portion of the amounts involved no ascertainment was necessary. The contract price paid for the barker not furnished constituted an overpayment of \$81,500.00; the overpayment of \$800.00 on the horizontal chipper was admitted (R. 74); and the reasonable cost of painting blow-pipe in the amount of \$218.40 was admitted (R. 73). So under any theory interest on these amounts from January 1, 1964, was unquestionably proper.

The Appellant next argues that, since there was no demand for interest in defendant's complaint, no interest is recoverable. The three Oregon cases mentioned do hold that where there is no demand for interest in the complaint none should be allowed.

But these cases were decided under the Oregon code pleading law, with the statutory requirement (ORS 16.210) that the complaint, if the recovery of money is demanded, must state the amount thereof.

This case was not initiated in the state court where code pleading and practice govern. It was initiated by Appellant, Soderhamn, in the federal court, and was conducted under the Federal Rules of Civil Procedure. The pre-trial order expressly provides (R. 23) that "the pleadings pass out of the case and are superseded by this order." The pre-trial

order sets forth the issues of fact and of law (R. 22) and the non-allowance of interest prior to judgment was not made an issue. In the Appellant's objections (R. 55-74) to the findings prepared by Appellee in response to the decision of the Court, Appellant claimed interest from November 13, 1963, and made no claim that interest was not allowable to Appellee.

Finally Appellant complains that the starting date of January 1, 1964, for the running of interest, has no relationship to any event in the case. It will be recalled that on November 13, 1963, Soderhamn took the barker away from the Martin plant at Oakland. This, perhaps, was the last date to have a "relationship" to an event in this case. Interest from this date was asked by Soderhamn. Interest should have commenced on this date, and delaying the commencement of the running of interest to the first day of the following year, perhaps out of an abundance of caution rather than for any sound reason, does not operate to the prejudice but rather redounds to the benefit of Appellant, and is no ground for complaint.

We think that the findings of the trier of the fact as to the interest should not be disturbed for any of the reasons assigned by the Appellant.

#### **SPECIFICATION OF ERROR NO. 5**

During the trial Appellant moved that the Court strike ALL of the testimony of the witness, Raymond Martin, which pertained to the amount expended by Appellee "for these various modifications and various

repairs and his testimony to the fact that such expenditures were reasonable" (App. Br. 13). The motion was denied, and this is specified as error.

The witness, Raymond Martin, was the Appellee's general manager, and was personally acquainted with every part of the installation. His familiarity with the situation is not questioned, and neither is his competency as manager of the owning company to give opinion evidence as to reasonable value. See in this respect *AMCA Lbr. v. Buckeye-Pacific Lbr.*, 233 Or. 611, 378 P.2d 738 (1963).

Further Appellant concedes that the evidence moved against was proper so far as Martin labor, as shown by the Martin time cards, was concerned (Br. 92). Appellant says, however, that except for these time cards none of the other items in the folders (Ex. 929) furnished foundation for his testimony. A fair construction of the record as regards the testimony of this witness will lead to the conclusion that the witness was referring to invoices, time cards and other similar documents only to refresh his memory. But even so, since it is admitted that part of the testimony of this witness, the time card information, on the subject of reasonable value was not subject to being stricken, it must follow that the general motion to strike all of the testimony on the subject was properly denied. *Cameron v. Columbia Builders*, 212 Or. 388, 320 P.2d 251 (1958) holds that a motion to strike is properly denied under the circumstances of this case. The Court there said:

“We think the motion to strike was properly denied for two reasons. In the first place, the motion was too broad. Even if we assume that plaintiff’s objection to a portion of the testimony was well taken, other portions ‘relating to the plaintiff’s vehicle’ were clearly admissible and were received without objection” (212 Or. at 395).

The Appellant makes further objection to the testimony of Mr. Martin as hearsay. Appellant states (Brief p. 92) that the trial Judge also recognized that much of Mr. Martin’s testimony (particularly as to costs) was hearsay, but held it not prejudicial, although counsel for Appellant “pointed out” that it would be prejudicial. As to this contention of Appellant, the language of the Supreme Court in *Pitts v. Crane*, 114 Or. 593, 236 P. 475, is apropos:

“Another objection relates to hearsay testimony given by Charles A. Stubbs. This witness had testified to a number of matters, including that of woodcutting by the plaintiff, Vern W. Pitts, when, in response to a question as to how he knew Pitts was cutting wood, he answered that Pitts had told him so. Were this the only testimony relating to the cutting of wood for defendant by this plaintiff, the ruling of the court in refusing to strike the hearsay testimony, upon proper motion, would be deemed serious. But, following the objectionable testimony witness testified, in effect, that he had seen Pitts cutting wood. Moreover, the record is full of competent evidence by both the plaintiff’s and defendant’s witnesses, and even by this defendant himself,

that he helped to cut forty-seven tiers of wood for the defendant." (114 Or. at 602-3).

And so it is in the present case. On the reasonableness of the amounts found due by the trial Court, there was evidence produced by the witnesses, Kemp, Halverson, McManama, Wahl (for Appellant) Kintz (for Appellant) and others, and "the record is full of competent evidence by both the plaintiff's and defendant's witnesses" apart from any evidence by the witness, Raymond Martin, to support the findings.

In spite of the difficulties which counsel for Appellant seems to have had with the folders in Exhibit 929, the documents supporting the amounts of the various charges are all in the record. They are properly arranged as to the contentions and findings of the Court in Appendix B.

The trial Court was right in the ruling denying the blanket motion to strike the testimony of the witness, Raymond Martin.

### CONCLUSION

The findings of fact as made by the trial Court, sitting without a jury, are in each instance sustained by competent and satisfactory evidence. The trial Judge sat through eight or nine days of trial, observing the witnesses, and taking extensive notes as the trial progressed. He made a careful personal inspection of the plant of Martin at Oakland, and personally observed the operation of the barker system

and the chipper systems. He had the arguments of the parties in lengthy briefs. He examined, considered and passed upon the Appellant's Objections to the Findings submitted. His findings and conclusions are fully supported. We do not think it true, as Appellant states in the brief that the trial Judge acted "summarily" or "failed adequately to review the evidence," but in any case the facts fully support the decision.

It is respectfully submitted that the allowance of interest on the balance found due from the due date was proper under the controlling Oregon law, that the refusal to strike the testimony of a witness had no effect on the decision, and that the Court was in all respects correct, and the judgment should be affirmed.

Respectfully submitted

IRVING RAND  
GEORGE W. MEAD  
Attorneys for Appellee

#### **CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE W. MEAD  
Attorney





## APPENDIX A

### Difficulties with the Soderhamn Debarker

Within a few days after operation commenced on June 28, 1962, the hydraulic pump inside the Barker broke (July 23, 1962), resulting in eight hours of downtime on that day (Ex. 924-B). Four days later (Friday, July 27) the Barker bearing required tightening, with eight hours downtime. The next day (Ex. 635) Martin was informed by TWX that Soderhamn personnel would be at the plant Monday. On Monday and Tuesday (July 30-31) the Soderhamn servicemen were working on the Barker.

August 9 there was downtime because of hydraulic leak in the Barker ring (Ex. 924-B). The next day (August 10) the electrical system quit working (Ex. 924-B). The next day (August 11) the Barker electrical system quit working because of oil leaks in the Barker ring (Ex. 924-B). Three days later there was a broken oil line in the Barker ring (Ex. 924-B). The following day the Barker electrical system failed (Ex. 924-B). The Barker was down from August 20 through August 25, with Soderhamn personnel working on it (Exs. 924-B, 638, 661, 662, 663, 668). Four days later (August 29) there was another breakdown in the oil line in the Barker ring (Exs. 924-B, 670). Again on each of the two succeeding days in August the hydraulic lines broke, resulting in each instance in a shutdown (Ex. 924-B).

During September, on three separate days trouble

was had with the Barker, resulting in each case in a shutdown (Exs. 924-B, 677, 638, 685).

In October trouble was encountered on six separate days (Ex. 924-B); and in November on five separate days (Ex. 924-B). Soderhamn sent to the Martin plant O'Callaghan and Roberts to install hose and replace pistons in rotor support cylinders (Ex. 706). Also on three days in December shutdown was necessitated because of Barker difficulties (Ex. 924-B).

During January, 1963, on each of seven days further difficulties with the Barker were encountered (Ex. 924-B).

Then on February 11 further difficulties were encountered, in that there was a hydraulic oil leak at the Barker and the hydraulic hose broke and the Barker ring would not go up (Ex. 924-B).

The following day the lube pump did not work, and again on February 13 would not work. The next day the Barker ring bearing froze.

These defects were reported to Soderhamn, and Soderhamn advised (Ex. 745) that the only thing in stock was a used rotor bearing that could be installed immediately, and that Soderhamn had contacted a source in Germany for a new rotor bearing to be sent air freight. This shutdown, beginning February 14, lasted until February 22.

On February 26 the Barker ring again was not working; and on the 28th the bearing races went out. This resulted in complete shutdown of the Barker for

the period from March 1 through March 15 (Exs. 924-B, 751, 753, 755, 756, 757).

By March 16 new bearings and races had been installed in the rotor. Operation commenced and the races lasted four hours (Ex. 924-B).

There was no possibility of operation from March 17 through March 28. The rotor was removed and taken to Portland to be re-machined. During the re-machining process it was discovered that the ring of the Barker was not only warped but was egg-shaped (Exs. 759, 762).

On March 28 the re-machined ring was put back into the Barker. The following day the Barker drive motor shorted out (Ex. 924-B).

Trial run of the newly re-machined rotor and check on bearing was had the first four days of April. Martin requested the presence of a Soderhamn representative for Friday, April 5, to observe the adjustment of the rotor bearing, and Soderhamn demanded "purchase order and non-cancellable check covering this expense" (Ex. 760).

Next on April 25 there developed an oil leak in the Barker ring (Ex. 924-B), and another again on the 30th.

The next month an abnormal noise developed coming from the rotor. Soderhamn was notified, and on May 15 its representative, Mr. Kornberg, sent a TWX that from information furnished him by his engineer it was impossible to ascertain the reason for the abnormal noise and only a rotor disassembly would reveal the difficulty (Ex. 769).

By May 17 the bearing had completely failed; metal was found in the oil filter (Ex. 770). A TWX to Soderhamn of May 17 notified Soderhamn that Martin had been unable to secure the recommended tolerances in the rotor bearing, and requested a representative of Soderhamn for inspection.

May 20 Soderhamn by TWX informed Martin that the rotor bearing parts were in stock and that Soderhamn would send its representative O'Callaghan down with parts on Wednesday morning (Ex. 771). The Barker ring was re-installed on May 23 (Ex. 924-B).

The Barker struggled along through June and July with difficulties in various portions of the machine, causing shutdowns on each of 13 days (Ex. 924-B).

On August 5 the lube pumps were found to be plugged with metal shavings, and a seventh bearing failure had apparently occurred (Ex. 924-B). Martin inquired of Soderhamn when a bearing assembly for replacement might be expected (Ex. 779), and when informed that balls for the bearing were enroute from the factory (Ex. 780) sent to Soderhamn a "Request that you pick up your Barker" (Ex. 781).

Soderhamn took the Barker away from the plant of Martin at Oakland (Agreed Facts, pre-trial order, R. 10) and rebuilt the machine, using races for the bearings of another design (Tr. 75) and sold the machine to a third party (R. 12).

## APPENDIX B

DOCUMENTS SUPPORTING COSTS INVOLVED  
IN THE FINDINGS AND CONCLUSIONS

The documents supporting the various costs involved are contained in Exhibits 809 through 819; 823; 824; 915, pages 1 through 48 (attached to answers to plaintiff's supplemental interrogatories); 917; 918; 921, A through N; 925; 928, A through C; and 929. Many Exhibits are duplicates of other Exhibits. Exhibit 929 is supposed to contain a complete list of all cost Exhibits involved. All of the documents referred to below are in one or more of the Exhibits mentioned. Reference in each instance to Exhibit number will therefore be omitted.

SUPPORTING DOCUMENTS AND BREAKDOWN  
OF DEFENDANT'S CONTENTIONSCONTENTION NO. 1—BARKER FOUNDATION  
STRUCTURE:

Martin Labor .....	\$	28.88
Sutherlin Machine, materials and labor per invoices		
D 1626		
D 1375		
D 1428		
D 1410		
D 1144		
D 1271		
D 1271-A		
D 1141		
D 1141-A		
D 1141-C		

D 1302	
D 1302-A	
D 1302-B	
D 1622	11,580.85

Total of Contention No. 1	\$ 11,609.73
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### CONTENTION NO. 2—LOG HAUL:

Martin Labor	\$ 5.78
Sutherlin Machine, materials and labor per invoices	
D 1201	
D 1201-A	
D 1201-B	
D 1201-C	\$ 2,963.25

Total of Contention No. 2	\$ 2,969.03
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### CONTENTION NO. 3 — TRANSFER DECK, KICKERS AND KICKER SHAFTS AND 3 PITS:

[3-ABC] Martin Labor	\$ 53.13	[Kickers and Kicker Shafts]
[3-ABC] Northwest Machinery Sales invoice No. 3923	\$ 35.00	[Kickers and Kicker Shafts]
[3-D & 17] McManama & Co., invoice No. 218-708	4,116.00	[Steel Deck]
[3-E] McManama & Co., invoice No. 218-717	1,833.10	[Pits]
Sutherlin Machine Works, materials and labor per invoices		
D 1559		
D 1615		
D 1368		
D 1368-A		
D 1306 [3-ABC]		

D 1306-A

D 1365

D 1241 .....\$ 5,392.25 [Kickers and  
Kicker Shafts]

Total of Contention No. 3 .....\$ 11,429.48

## CONTENTION NO. 4—SHEER APRONS OR PLATING:

Sutherlin Machine Materials

per invoices

D 1144-A-1

D 1144-A-2 .....\$ 2,758.16

Total of Contention No. 4 .....\$ 2,758.16

## CONTENTION NO. 5—BARKER REFUSE CONVEYORS:

Martin Labor .....\$ 65.45

American Steel & Supply Co.  
materials, per invoices

R 28159

R 28160

R 28161 ..... 240.49

Industrial Electric Supply,  
materials, per invoices

F-912

F-925 ..... 90.72

McManama &amp; Co., invoices

No. 218-704 and 218-718 .... 4,340.30

Total of Contention No. 5 .....\$ 4,736.96

## CONTENTION NO. 6—SAW DECK:

A—SHROUDING

Sutherlin Machine, materials  
and labor, per invoices

D 1508  
 D 1669 ----- \$ 1,917.06

Total Contention No. 6-A ----- \$ 1,917.06

B—LOG LIFTS (Including Necessary  
 modification of saw deck to make  
 lifts and saws an operable system)

Modification of Saw Deck

D 1877  
 D 1144-B-1  
 D 1144-A-2  
 D 1323  
 D 1680 ----- \$ 1,951.32

Assembly of Log Lifts

D 1864  
 D 1898  
 D 1996 ----- 5,444.34

Total Contention No. 6-B ----- \$ 7,395.66

(Total Contentions No. 6-A and 6-B --- \$ 9,312.72)

C—SINKER DECK TRANSFER CHAIN

Sutherlin Machine, labor,

invoices D 1254 ----- \$ 56.00

Total Contention No. 6-C ----- \$ 56.00

D—STRUCTURE OVER SAWS

McManama & Co. quote --- \$ 1,161.00

Total Contention No. 6-D ----- \$ 1,161.00

CONTENTION NO. 7—HYDRAULIC SYSTEM

Mobile Oil Co., invoice

No. 161106 ----- \$ 739.53

Brent's Exchange, materials

No. 30276

No. 32510 ..... 73.36

Component Parts Co., materials

invoice No. 11796.....\$ 18.30

Hydraulic & Air Equipment

Co., materials, invoice

No. 65444 ..... 17.41

Fluid Air Components, Inc.,

materials, invoices

2351 and 2869 ..... 370.75

Sutherlin Machine, labor

and materials, per invoices

D 1292

D 1292-A

D 1346 .....\$ 842.13

Martin Labor ..... 68.28

---

Total Contention No. 7 .....\$ 2,130.76

## CONTENTION NO. 8—DEBARKER:

### A—DEBARKER REPAIRS

American Steel & Supply Co.,

materials, per invoices

R-2 3582

R-2 3583

R-2 31503 .....\$ 264.01

Martin Labor ..... 427.35

Sutherlin Machine, labor,

per invoices

D 1874

D 1899

D 1897

D 1869-A

D 1869-A ..... 1,975.20

Total Contention 8-A .....\$ 2,666.56

## B—RECONSTRUCTING BARKER BUILDING

Moore Steel Service,  
materials, per invoices

R-8605 7764

R-8657 7804

R-8757 7928

R-8308 7529

R-1032 1095

R-1082 1165

R-1061 1131

R-1159 1211 .....\$ 684.50

Woodbury & Company,  
materials, per invoices

E 90909

E 90516

E 96448 ..... 693.92

Nicholson Mfg. Co., materials

and labor, invoice 903 ..... 2,807.98

Martin storeroom materials ..... 27.15

Martin Labor ..... 2,151.77

Crane Rental ..... 2,131.50

Total Contention 8-B .....\$ 8,496.82

## C—START UP

Martin Labor .....\$ 291.83

Total Contention 8-C .....\$ 291.83

## D—NEW DEBARKER (As set forth in Contentions, PTO)

Nicholson Barker .....\$97,239.00

As modified in Opening

Brief, contract price of  
Barker never supplied ----- 81,500.00

Total Contention 8-D ----- \$ 81,500.00

# CONTENTION NO. 9—CONSOLE:

Moore Steel Service Co.,  
materials, invoice  
No. R 6354 ----- \$ 98.30  
Sutherlin Machine, labor  
and materials, invoice  
No. R 1344 ----- 201.40  
Martin Labor ----- 123.20

Total Contention No. 9 ----- \$ 422.90

# CONTENTION NO. 10—CONVEYORS TO HOG:

Industrial Electric Service,  
materials, invoice No.  
DO 2932 ----- \$ 7.29  
Martin Labor ----- 9.63

Sutherlin Machine, labor  
and materials, per invoices

D 1251

D 1609

D 1690

D 1273

D 1273-A

D 1278

D 1278-A

D 1278-C

D 1278-B

D 1278-D

D 1872-B

D 1871-B

D 1394

D 1432  
 D 1432-A .....\$14,046.10

Total Contention No. 10 .....\$ 14,063.02

# CONTENTION NO. 11—PAINTING BLOW PIPE:

Sutherlin Machine, labor  
 and materials, invoice  
 No. D 1873 .....\$ 218.40

Total Contention No. 11 .....\$ 218.40

# CONTENTION NO. 12—HORIZONTAL CHIPPER FEED SYSTEM:

SHAKER ROLL SECTION  
 Industrial Electric Service,  
 materials, invoice  
 No. 00525 .....\$ 11.82  
 Martin Labor ..... 1,388.70  
 Sutherlin Machine, labor  
 and materials, per invoices  
 D 1713  
 D 1713-A  
 D 1713-B  
 D 1724  
 D 1698 .....\$ 8,131.05

Total Contention No. 12 .....\$ 9,531.57

# CONTENTION NO. 14—HORIZONTAL CHIPPER ROOF OVER BELT:

Sutherlin Machine, labor  
 and materials, invoice  
 No. D 1863 .....\$ 558.10

Total Contention No. 14 .....\$ 558.10

# CONTENTION NO. 15—CORE-VENEER BLOWER SYSTEM:

Archer Blower & Pipe Co.,  
Inc. -----\$12,397.00

Total Contention No. 15 -----\$ 12,397.00

# CONTENTION NO. 16—BRUSHES:

Sutherlin Machine, labor  
and materials per invoices

D 2028

D 1879

D 1896 -----\$ 941.38

Total Contention No. 16 -----\$ 941.38

# CONTENTION NO. 17—WALKWAYS AND TAIRWAYS:

McManama & Co., invoice

No. 218-701 -----\$ 2,348.00

Total Contention No. 17 -----\$ 2,348.00

# CONTENTION NO. 18—MISCELLANEOUS:

## INSURANCE

Barker

initial charge \$1,862.43

credit -----(1,439.68) \$ 422.75

Other

8 mos. @ 112.05 896.40

New Zealand Policy -----410.00

Total Contention No. 18 (Insurance)---\$ 1,729.15



No. 22,286 ✓

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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TRANSAMERICA EQUIPMENT LEASING CORPO-  
RATION, a Texas corporation,

*Appellant,*

vs.

UNION BANK, a California corporation,

*Appellee.*

Appeal from a Judgment of the United States District Court  
for the Central District of California

Honorable Manuel L. Real, Judge

**APPELLANT'S OPENING BRIEF**

---

ARTHUR J. LEMPert,

220 Bush Street,

San Francisco, California 94104,

*Attorney for Appellant.*

FILED

AUG 1 1953

WALSH & COMPANY, ATTORNEYS



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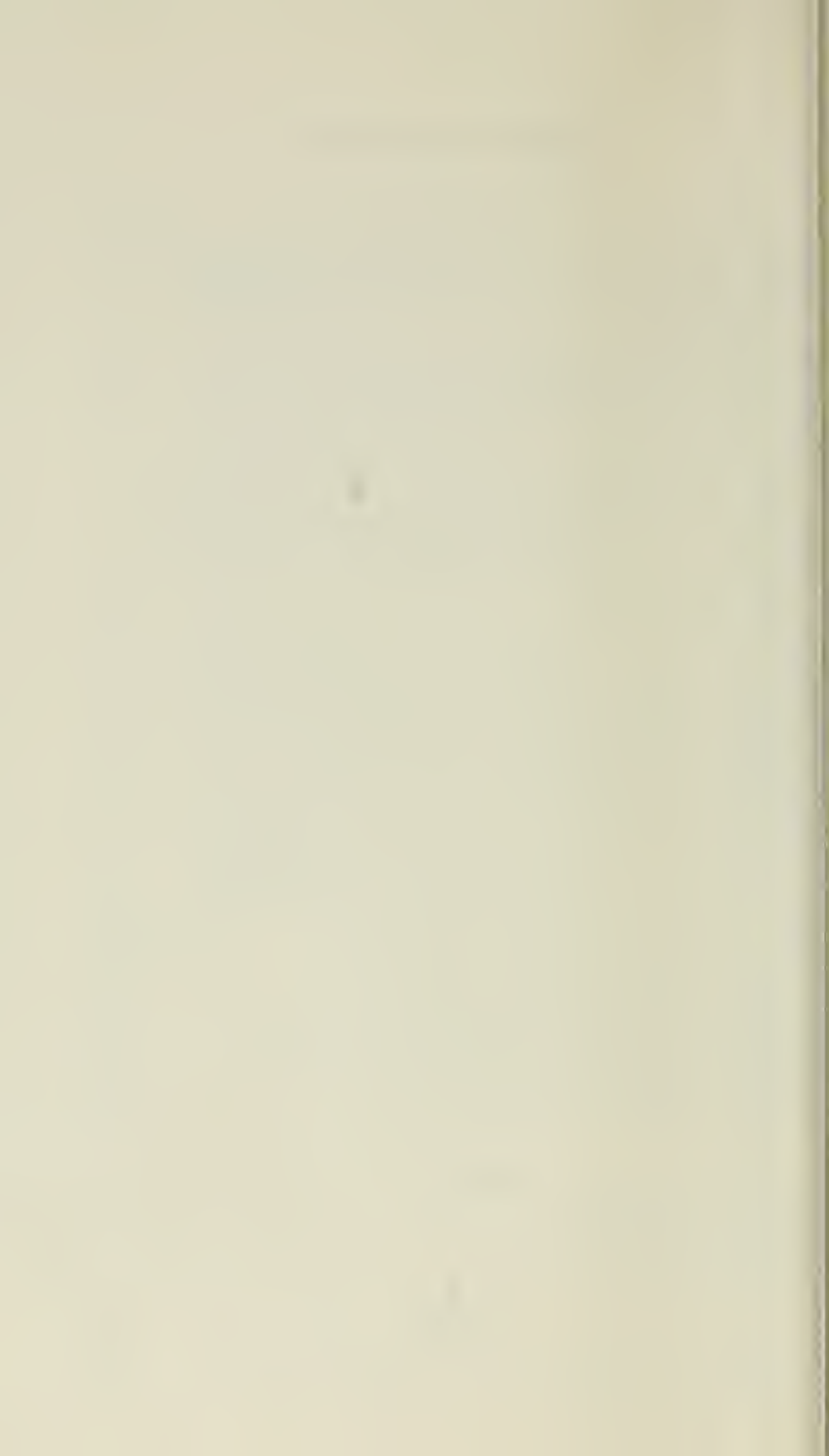
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No. 22,286

IN THE

**United States Court of Appeals  
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TRANSAMERICA EQUIPMENT LEASING CORPORATION, a Texas corporation,

*Appellant,*

VS.

UNION BANK, a California corporation,

*Appellee.*

Appeal from a Judgment of the United States District Court  
for the Central District of California

Honorable Manuel L. Real, Judge

**APPELLANT'S OPENING BRIEF**

---

**I**

**STATEMENT OF JURISDICTION**

Plaintiff Transamerica Equipment Leasing Corporation ("Transamerica") was incorporated in Texas with its principal place of business in Texas. Defendant Union Bank ("Bank") was incorporated in California with its principal place of business in California. (Admitted in Pretrial Conference Order, R 216.)\* The amount in controversy, exclusive of in-

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\*"Tr." refers to the Reporter's Transcript.

"R" refers to the Clerk's Record.

terest and costs, exceeds \$10,000. (Complaint, paragraphs I and V, R 2-3.) The jurisdiction of the District Court was invoked under Title 28 U.S.C. Sec. 1332.

The District Court entered its judgment on April 11, 1967. A Notice of Appeal was duly filed. (R 339.) Jurisdiction is vested in this Court by Title 28 U.S.C. Sec. 1291.

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## II

### STATEMENT OF THE CASE

This case involves a contract to make a loan. The basic issue in this appeal is whether a contract was formed. The principal controversies are whether an oral agreement was barred by the Statute of Frauds and whether a designated repayment schedule was an essential term of the contract.

These are the facts:

#### 1. Background

(a) In August, 1963, Transamerica, which was in the business of providing financial services (Tr 19), agreed to provide funds to Ancora Corporation ("Ancora"). (Tr 21, 36, 39; Exhibit 2.) The total amount to be advanced was \$600,000. Ancora's repayment obligation was evidenced in part by an equipment lease and in part by a promissory note. Both were secured by a Mortgage and by an Assignment of Runs (proceeds of sales of oil) covering six

oil wells operated by Ancora. (Exhibits 2, 4, 4A, 4B, 4C, 4D, 6; Tr 21, 36, 39.)

(b) Prior to entering into such agreement with Ancora, Transamerica commenced negotiations with Bank to borrow the funds which Transamerica, in turn, proposed to advance to Ancora. (Tr 24.) On August 21, 1963, Smith, an agent of Bank, advised Transamerica of the engineering requirements which it would be necessary for the Ancora wells to satisfy in order for Bank to lend money and Smith suggested that Eugene Fiedorek be employed to prepare the engineering report. (Tr 33-36.) Smith also stated the maximum amount which could be lent on each well and the interest rate applicable. He also advised Transamerica that it would be necessary for Transamerica to maintain a 20% compensating balance with Bank, or, in lieu thereof, to give to Bank a note for the amount of Bank's equivalent interest on such compensating balance. (Tr 33-36, Exhibits 20, 28, Tr 213-215.)

(c) On August 22, 1963, Transamerica informed Ancora that the financial transaction with Ancora would be contingent on satisfaction of the Bank's well production and engineering requirements. (Tr 36.) Transamerica and Ancora thereupon entered into a written agreement to make the loan. (Exhibit 2.) The repayment schedule attached to the agreement had previously been reviewed with Bank. (Tr. 33.) Ancora then executed and delivered to Transamerica an Equipment Lease, Note, and Mortgage and Assignment of Runs. (Exhibits 4A, 4B, 4D; 6.)

These documents provided for Ancora to make total payments of \$724,932 to Transamerica, in installments at a *minimum* rate as follows:

Payment (at start of month)	Lease	Note	Each Monthly Payment	Total All Payments
1st month	\$22,920.00	-0-	\$22,920.00	\$ 22,920.00
2d thru 6th	15,076.06	\$7,843.94	22,920.00	114,600.00
7th thru 12th	12,346.06	7,843.94	20,190.00	121,140.00
13th thru 18th	9,976.06	7,843.94	17,820.00	106,920.00
19th thru 24th	7,936.06	7,843.94	15,780.00	94,680.00
25th thru 30th	6,148.06	7,843.94	13,992.00	83,952.00
31st thru 36th	4,606.06	7,843.94	12,450.00	74,700.00
37th thru 42d	3,226.06	7,843.94	11,070.00	66,420.00
43d	-0-	7,843.94	7,843.94	7,843.94
44th	5,356.06	-0-	5,356.06	5,356.06
45th thru 48th	6,600.00	-0-	6,600.00	26,400.00
Total				\$724,932.00

(Exhibits 4A, 4B, 4D.)

Ancora was also required to pay a minimum of \$24,000 at the end of the initial lease term in order to continue to operate the wells. (Tr 184.)

(d) The said agreements further provided that Transamerica (or its assignees) would receive *all* of the proceeds of sale of the oil produced from the six designated wells until the total sum was paid, and would be empowered

“to receive, collect and *hold* (all such runs) . . . and, any provision of said indebtedness secured hereinabove described to the contrary notwithstanding, (all such runs) shall be applied to the payments of the indebtedness secured hereby in such manner as the Mortgagee may elect and without any liability or responsibility on the part

of the Mortgagee, regardless of whether such payments exceed the payments of principal and interest provided to be paid in said indebtedness secured hereby . . .” (Exhibits 4D, 11-12.)

(e) Between August 22 1963, and September 12, 1963, Transamerica notified Bank that Transamerica and Ancora had

“agreed on a schedule of payments which will allow us to amortize two notes with the Union Bank over the desired payout period. Our attorney will contact Mr. Breakstone direct regarding the exact wording to be used in the Assignment of Production which will describe the payment sequence as concerns the two notes. . . .” (Exhibit 16.)

Copies of the proposed schedule were furnished to Bank. The Bank was also furnished with copies of the Equipment Lease, Note, Bill of Sale, Mortgage and Assignment of Runs between Transamerica and Ancora. (Exhibits 4A, 4B, 4C, 4D) and the proposed Assignment of Runs, Assignment of Lease and Chattel Mortgage between Transamerica and Bank. (Exhibits 21, 22, 23; Tr 51.)

Plaintiff concurrently began arrangements with counsel in Mobile, Alabama, to provide approving title opinions on the wells.

(f) On or shortly after September 10, 1963, Fiedorek’s engineering report was delivered to Bank. Smith analyzed the report and concluded that the evaluation was acceptable and sufficient to support the proposed loan to Transamerica of \$600,000, and that

it satisfied Bank's requirements for such a loan. (Tr 281-282; 285-286; 336-337.)

## 2. Oral Agreement

(a) On September 12, 1963, Transamerica's president met with Smith and Breakstone, Bank's attorney, in order to obtain final approval of the loan, to determine closing procedures and to prepare the necessary documentation. (Tr 48.) Breakstone reviewed and approved the aforementioned documents executed by Ancora. Breakstone also reviewed the proposed Assignment of Runs, Assignment of Lease and Chattel Mortgage from Transamerica to Bank. (Tr 283-285; 369 (with reference to Breakstone deposition pp. 14-16).) Smith did not indicate any objection to the payment schedule described in the letter of August 30, 1963. (Tr 222.)

(b) During discussion on September 12, 1963, the parties agreed on the method of computing the amount of the note in lieu of the compensating balance but they did not calculate such amount or decide whether the note should be paid in 42 equal monthly installments or in 42 installments which declined in the same proportion as the monthly payments on the \$600,000 note. It was agreed that the Bank could select either arrangement. (Tr 78-80.)

(c) During the afternoon of September 12, Smith and Breakstone presented the loan to Siegel, the Bank officer authorized to approve loans. Smith reviewed with Siegel the amount, term, rate and other provisions of the proposed loan. (Tr 285-293.) Siegel

did not object to the amount or terms, but stated that since Fiedorek had been an officer of the Bank and was still retained by the Bank for certain duties, it would be necessary to obtain a concurring report from another engineer and suggested Schafer. (Tr 58; Exhibit 29.)

(d) On September 13, 1963, plaintiff's president met with Siegel. Siegel reiterated the necessity of a concurring report from Schafer. Siegel then told plaintiff's president that "if the Schafer report concurs with Fiedorek's, you have a loan." (Exhibits 25, 29; Tr 59.)

(e) Siegal orally agreed to make the loan to Transamerica subject to the sole condition that the Schafer report concur with Fiedorek's. (Exhibits 25, 29; Tr 59.)

(f) Bank immediately called Schafer and engaged him to prepare an engineering study of Ancora's wells. (Tr 60.) Transamerica proceeded to obtain the title reports, bills of sale and other documents required for a closing in Mobile, Alabama, tentatively scheduled for Monday, September 23, 1963. (Tr 60.)

### 3. Written "Loan Agreement"

(a) On September 16 and September 17, 1963, Breakstone prepared two Promissory Notes to evidence the contemplated loan from Bank to Transamerica, and he also prepared a document entitled "Loan Agreement". (Tr 381.) The Loan Agreement

was executed by authorized officers of Bank and on September 18, 1963, the said "Loan Agreement" was mailed to Transamerica together with the Promissory Notes and an Assignment of Mortgage. Transamerica was requested by Bank to hold the documents until Breakstone arrived in Dallas, Texas, on or about September 22, 1963, and to manually deliver the documents to Breakstone at that time. (Exhibit 11.)

(b) Bank had computed the amount of the note to be delivered in lieu of a compensating balance, and in the letter of September 18, 1963, Breakstone stated:

"We calculated the fee note on the basis of what the interest would be on a loan of \$120,000.00 at 5.5% and a pledge to the Bank. It is easier book-keeping-wise for us to do it this way, and it will cost you no more. If you do not agree with the figure based on your calculations, then we can prepare a new fee note." (Exhibit 11.)

Bank's computations were satisfactory to Transamerica. (Tr 80.)

(c) The Loan Agreement expressly referred to the Assignment of Lease, Assignment of Runs and Chattel Mortgage reviewed with Breakstone on September 12, 1963, which documents, among other things, effected an Assignment of *all* of the oil runs from the six wells. (Exhibit 11, paragraph 2.) The Loan Agreement then described the amount to be loaned to Transamerica, the interest rate, the term, and the promissory notes to evidence the loan. The Loan Agreement then stated:

“both notes shall be paid monthly out of runs from the producing properties mortgaged and assigned to Bank. Application of proceeds therefrom shall be as follows: First on the monthly payment due on Note ‘B’, and the balance remaining to be applied first on interest and then on principal as to Note ‘A’, *not exceeding, however*, as to Note ‘A’, the monthly payment set forth in the schedule to be agreed to by and between the parties hereto. After application of proceeds as aforesaid, any excess remaining in any given month after deducting therefrom a given amount or percentage for operating expenses shall be retained by Bank and deposited in a special reserve account for Borrower, provided, however, that said reserve account shall at no time be in excess of Seventy-Five Thousand Dollars (\$75,000.00)” (Exhibit 11; emphasis added.)

(d) The only effect of “the schedule to be agreed to” was to allocate the gross monthly runs among segments of the same bank loan by providing a *maximum* amount to be applied monthly to one of the notes. There would be no difference in the aggregate monthly payment to defendant or in the forty-two month total of payments. (Exhibit 11; Tr 389.)

(e) No arrangements were made for the preparation of any such schedule between September 18, 1963, and the tentative closing on September 23, 1963. Smith, who was handling the loan for Bank, did not discuss with anyone the preparation of any such schedule. (Tr 298.)

(f) An arithmetic calculation showing the application to the Bank's two notes of the *minimum* payments required from Ancora is set forth in Schedule "A" in the Appendix to this Brief. (The first payment due from Ancora is not applied to the Bank's notes pursuant to paragraph 1.1.A of Exhibit 22.) The total payments to Bank under such schedule were \$680,599. The total of all the payments required from Ancora to Transamerica was \$748,932. The difference of \$68,333 was Transamerica's expected profit on the transaction.

#### 4. Breach

(a) On September 19, 1963, Schafer called Smith and reported that his estimates of the primary reserves of the Ancora wells were as close to the estimates of Fiedorek as it was possible for two independent studies to come. (Tr 299.) Schafer then said that he had not had sufficient time to estimate proved secondary reserves, but he had computed possible secondary reserves. (Tr 263.) The figure was in excess of Fiedorek's. (Tr 269, 271; Exhibits 5, 17.) Schafer stated that Fiedorek's report called attention to certain assumptions and if Schafer made the same assumptions, he computed substantially the same secondary reserves as Fiedorek. (Tr 276.) Schafer had not completed his report with respect to secondary reserves when he called Smith. (Tr 267.) Schafer told Smith that since his report was not complete he had no opinion on whether he concurred or did not concur with Fiedorek. (Tr 270.)

(b) Smith had not previously considered the significance of the secondary reserves in the Fiedorek report. When they were called to his attention by Schafer, he changed his mind as to the desirability of the loan. On September 19, 1963 Smith told Transamerica that Bank could not make the loan unless the Schafer report was modified. (Exhibit 25, p. 2; Tr 302, 374.)

(c) On September 20, 1963, Transamerica called Breakstone and discussed the situation with him. Breakstone foresaw difficulties for the Bank in withdrawing from the loan commitment. (Exhibit 25.) After the conversation with Transamerica, Breakstone called Siegel and advised him that litigation threatened in connection with the loan. (Exhibit 29.) Plaintiff had made no threat of litigation. (Exhibit 25.) But Siegel, having been advised that there had been a threat, directed that the Bank would not make the loan "under any circumstances." (Exhibit 29; Tr 358.) On September 20, 1963, Transamerica was advised that the loan would not be made. Thereafter, Transamerica received Bank's letter of September 18, 1963, and the Loan Agreement.

(d) The loan was not made.

---

### III

#### STATEMENT OF THE QUESTIONS PRESENTED

1. Was the oral agreement of the parties of September 13, 1963, barred by the Statute of Frauds?

2. Was the schedule of the maximum amount to be applied to one of the notes, thus allocating an agreed upon payment between different segments of the same loan, an "essential term" of the loan agreement?

3. Was the loan agreement executed by Bank on September 18, 1963, a contract or merely an offer to make a contract which could be withdrawn by Bank before it was executed by Transamerica?

4. Did the Schafer report concur with the Fiedorek report and, if it did not, was nonconcurrence excused because of the Bank's breach?

5. Did the Court err in making certain findings of fact?

---

## IV

### **SPECIFICATION OF ERRORS**

1. The Court erred in concluding, as a matter of law, that the oral agreement between the parties was barred by the Statute of Frauds.

2. The Court erred in concluding, as a matter of law, that the parties had not reached an agreement on an essential term of their contract.

3. The Court erred in concluding, as a matter of law, that certain agreements constituted an offer which could be withdrawn and not a binding contract.

4. The Court erred in concluding, as a matter of law, that the performance by plaintiff of conditions precedent to the contract were not excused by defendant's prior breach.

5. The Court made seven findings of fact which were not supported by any substantial evidence and which were grossly erroneous:

(a) The Court erred in its finding that the terms and conditions of the loan transaction were to be reduced to writing and said writing was to constitute the agreement of the parties with respect to the subject matter thereof. (Finding XI(a).)

(b) The Court erred in its finding that the parties did not agree upon "the terms and conditions for the repayment of the loan" and expressly reserved "such terms and conditions for repayment" for future negotiations and agreement. (Finding XIV.)

(c) The Court erred in its finding that the Schafer report did not concur with the Fiedorek report. (Finding XVII.)

(d) The Court erred in its finding that the Schafer report was required to satisfy the Bank's loan standards. (Finding XI(b).)

(e) The Court erred in its finding that the plaintiff was not committed to purchase oil well equipment or lend sums of money to Ancora. (Finding XIX.)

(f) The Court erred in its finding that the agreements of the parties were "offers". (Finding XI.)

(g) The Court erred in its finding that the repayment schedule furnished to Bank between August 22, 1963, and September 12, 1963, was only a schedule of "lease payments" (rather than lease and note) and that the first and last *five* payments were omitted (rather than the last *three* payments). (Finding IX.)

## V

## ARGUMENT

**1. THE ORAL AGREEMENT OF THE PARTIES IS NOT BARRED BY THE STATUTE OF FRAUDS.**

The Court determined, as a conclusion of law, that:

“In the event any verbal agreement was made or entered into by and between plaintiff and defendant on September 12, 1963, or September 13, 1963, any such agreement would be barred and would be unenforceable by reason of the statute of frauds.” (R 321.)

The Court erred for three reasons:

a. Under California law, any right to rely on the Statute of Frauds was waived by defendant and could not be asserted by the trial Court judge on defendant's behalf.

b. There were written memoranda which satisfied the requirements of the statute.

c. The trial Court totally misapprehended the effect of the evidence before it.

a. **An oral agreement under the statute of frauds is voidable, not void. The objection may be waived. It was waived in this case.**

In paragraph III of the First Cause of Action in this Complaint (R 3), in plaintiff's pretrial Memorandum of Contentions of Fact and Law (pp. 18-19), in the Pretrial Conference Order (R 217-218), in its opening statement (Tr 12), and immediately upon the conclusion of its case (Tr 394), plaintiff asserted its intention to rely on the oral agreement. Evidence was

introduced, without objection and without any motion to strike, proving the existence of such an oral agreement made on September 13, 1963.

Such evidence consisted, in part, of the following:

- (i) Testimony of C. Lee Chipman. (Tr 59.)
- (ii) Testimony of Harold P. Smith. (Tr 293.)
- (iii) Exhibit 29, p. 1. (Admitted Tr 306.)
- (iv) Exhibit 25, p. 2. (Admitted Tr 77, 372.)

At the conclusion of plaintiff's case and at the conclusion of the trial the Court made the first and only references to the Statute of Frauds by inquiring whether it was a bar to the alleged oral agreement. (Tr 402, 431.) The judge's last words at the trial were:

“On the basis of the evidence of what Mr. Chipman testified to and what Mr. Breakstone testified to you might do some research on the statute of frauds.” (Tr 449.)

Defendant, however, never once raised the point, nor moved to strike any of the evidence which proved the oral agreement, nor even alluded to the matter in its post trial brief. (R 275.)

The trial Court, in the Memorandum entered March 21, 1967 (R 298), said the “purported oral ‘Lease Agreement’ of September 13, 1963, is barred by the Statute of Frauds” and it subsequently made the conclusion of law quoted above. Since it eliminated the issue as a matter of law, the Court did not make any finding of fact with respect to the existence of the oral agreement.

Under California law, when proof of an oral contract is admitted without objection, or without any motion to strike, the right to rely on the statute of frauds is waived.

In *Pao Ch'en Lee v. Gregoriou* (1958) 50 Cal.2d 502, the Court noted:

" . . . it is settled that (1) a defendant waives his right to rely upon any provisions of the statute of frauds (Civ. Code, § 1624) by failing to (a) demur to the complaint, (b) object to the introduction of testimony to prove the oral agreement at the time of trial, or (c) make a motion to strike such testimony." (506.)

See also:

*Howard v. Adams* (1940) 16 Cal.2d 253, 257, 105 P.2d 971;

*McKinley v. Lagae* (1962) 207 Cal.App.2d 284, 293;

*Sloan v. Hiatt* (1966) 245 Cal.App.2d 926;

*Nunez v. Morgan* (1888) 77 Cal. 427, 432, 19 P. 753;

*Coleman v. Satterfield* (1950) 100 Cal.App.2d 81, 83, 223 P.2d 61;

*Aaker v. Smith* (1948) 87 Cal.App.2d 36, 43, 196 P.2d 150;

*Ingraham v. Smith* (1948) 83 Cal.App.2d 807, 808, 189 P.2d 721.

In *Bank of America v. Hutchinson* (1963) 212 Cal. App.2d 142, the plaintiff referred to an oral agreement in the pretrial order and during the trial. After the trial was concluded, the trial judge inquired

whether either counsel had looked into the bearing of the Statute of Frauds on the case. Both counsel indicated they had not looked into the subject. Two weeks later, the defendant, claiming the Statute of Frauds, moved to strike all testimony and evidence relating to the oral representations.

The Court held the Statute of Frauds could not be asserted as a bar.

“ ‘Since the statute of frauds relates only to a remedy, and not to a right, a defense based on its provisions can be waived. For instance, where the defendant has permitted parol proof of the existence of a verbal contract within the scope of the statute to be admitted without objection or exception, he will, as a general rule, be deemed to have waived the defense of the statute, and a belated motion to strike such oral evidence, made at a subsequent stage of the trial, should be denied.’ ” (149.)

Since defendant in this case did not assert the bar of the Statute of Frauds it was waived and the Court cannot present the claim on defendant's behalf. Defendant, with its eyes open, permitted extensive testimony and evidence to be admitted showing an oral agreement. Whether it did so deliberately for reasons of trial strategy or whether it did so through neglect is of no consequence. The trial Court has no authority to thrust on the Bank an optional remedial defense which the Bank did not elect to employ. The law is clear that the defense, not used, is waived. The Court's conclusion of law treats the Statute of Frauds

as a matter of substantive right which is not subject to waiver. In this the Court was plainly wrong.

The Court recognized that there might have been an oral agreement. Its conclusion used the language "In the event any verbal agreement was made. . . ." But the Court, relying improperly on the Statute of Frauds, declined to make any finding of fact on the ultimate issue of whether there actually was an oral agreement. That issue should have been determined and the evidence indicates it should be determined in plaintiff's favor. Plaintiff's motion for New Trial was based on this issue. (R. 324.) The Motion was improperly denied (R 337.) A new trial should be granted.

**b. There were written memoranda in this case which satisfied the statute of frauds.**

The requirements of the statute may be satisfied by memoranda executed subsequent to the agreement, or which are embodied in several papers or which refer to other documents which are fairly connected; the memoranda need not be delivered nor even to have been intended as memoranda of an oral contract:

*Simmons v. Birge Co.* (1943) 52 F.Supp. 629;

*Mangini v. Wolfschmidt Ltd.* (1961) 192 Cal.

App.2d 64;

*Bowens v. Jung* (1944) 57 F.Supp. 701;

*Searles v. Gonzalez* (1923) 191 Cal. 426;

*Quan Shew Yung v. Woods* (1963) 218 Cal.

App.2d 506.

In *Straus v. De Young* (1957) 155 F.Supp. 215, Judge Jertberg reviewed the California law on the

nature of the writing required under the Statute of Frauds and concluded:

“That a contract may consist of several documents . . .

“That it is not necessary that the party to be charged sign all of the documents comprising the contract, if one of the documents in the series, or all of the documents taken together set forth clearly and completely all of the essential elements of the contract, except those which may be reasonably implied as being present and inherent in the deal . . . .”

“The document signed does not need to contain all of the terms of the contract; and the document signed does not need to be addressed to the other party.” (218.)

\* \* \* \* \*

“A memorandum signed by the party to be charged which forms no part of the contract, but which recognizes the existence of a contract, is a sufficient memorandum. . . .” (218-219.)

In this case the oral agreement was established by the Bank's signed memorandum (Exhibit 29) as well as by the Lease Agreement, (Exhibit 11) signed by the Bank, which referred to the documents identified as Exhibits 21, 22, 23 and 4A, 4C, 4D and 4E. These papers showed an agreement (conditioned on a concurring engineering report) to lend \$600,000, the repayment obligation to be evidenced by a note for \$11,500, bearing no interest, and another note for \$600,000 bearing interest at 7%, both secured by six designated wells, and payable in 42 installments,

out of the runs from such wells, with minimum payments as set forth in Exhibits 22, 4A, 4B and 4D.

**c. The trial court misapprehended the evidence bearing on the oral agreement.**

The Court's attitude toward the oral agreement issue was materially affected by a gross misapprehension of certain testimony.

The Court, during argument, repeatedly commented that Transamerica's president had testified that no oral agreement had been made. The Court said:

"Your client testified that when he left the bank on the 13th there was no agreement as to a loan, that he didn't think he had an agreement with the bank at that time. He testified to that directly, counsel." (Tr 418, 419.)

The Court later said:

"[T]here was no agreement by your client's own testimony when he left on September 13th." (Tr 432.)

There was remonstrance:

"Mr. Lempert: Your Honor mentioned some direct testimony of Mr. Chipman that I have no vivid recollection of.

The Court: I have a very vivid recollection because that is one of the issues here. When he left on the 13th he had no agreement for a loan." (Tr 419.)

A searching analysis of the transcript will show that the testimony repeatedly cited and relied on by the Judge did not exist. Mr. Chipman never said any-

thing remotely resembling what the Court attributed to him.

The Court made its decision in this case believing that Chipman had given testimony which he did not give. Its decision therefore was based, in part, not on evidence but on myth.

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**2. THE WRITTEN LOAN AGREEMENT DID NOT RESERVE ANY "ESSENTIAL TERMS" OF THE CONTRACT FOR FUTURE NEGOTIATION.**

Evidence was introduced showing that there was a written agreement, as well as an oral agreement. The Court determined, as a conclusion of law, that:

"The written loan agreement, dated September 18, 1963, is not binding upon the parties because it reserves for future negotiation and agreement of the parties the terms and conditions upon which the subject loan would be repaid, which said terms and conditions of repayment were essential terms of the contemplated loan transaction." (R 321.)

The Court erred; there was only a single matter which the written Loan Agreement (R 6; Exhibit 11) appeared to leave for future determination, and that was not an "essential term" of the contract.

The Loan Agreement, after it recited in paragraph 8 that the bank would receive all of the Ancora runs each month, stated that the gross runs would be applied first to the compensating balance note and the remainder to interest and principal on the other note

“not exceeding, however . . . the monthly payments set forth in the schedule to be agreed to by the parties.” The balance went to a reserve.

The Court’s conclusion of law is rooted in the assumption that an internal allocation of the Bank’s gross monthly payments, which neither affects the amount the Bank is entitled to receive each month, nor the total amount the Bank is to receive, is an “essential term.”

“Mr. Lempert: Do I understand your Honor feels that that difference, which does not affect the total amount the bank receives (nor)\* the Bank’s total compensation for the loan (and) which only affects an allocation between two pieces of the same transaction is such a material point, such a significant and substantial point that no contract exists?

The Court: Yes, certainly it is. Yes, it is.”  
(Tr 445.)

The trial Court’s view is not the law.

- a. **Essential terms are those without which a contract is unintelligible and unenforceable.**

In *City of Los Angeles v. Superior Court* (1959) 51 Cal.2d 423, the Supreme Court of California said:

“The contract is claimed to be void because it contains promises to agree in the future. The general rule is that if an ‘essential element’ of a promise is reserved for the future agreement of both parties, the promise gives rise to no legal obligation until such future agreement is made.

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\*Words in parentheses are corrections of the Reporter’s Transcript.

. . . The enforceability of a contract containing a promise to agree depends upon the relative importance and the severability of the matter left to the future; it is a question of degree and may be settled by determining whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms would make unfair the enforcement of the remainder of the agreement. . . . Where the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced.” (433.)

In the case of *Wong v. Di Grazia* (1963) 60 Cal.2d 525, the Supreme Court said:

“A minor possible ground of disagreement in an otherwise complete agreement will not render the agreement uncertain. . . . As this court held in *Roy v. Salisbury* (1942) 21 Cal.2d 176, 184 ‘. . . the law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained.’” (539.)

*Mancuso v. Krackov* (1952) 110 Cal.App.2d 113 involved a sale where the prices and quantities were left contingent on later determinations. The court noted:

“It is only that the essentials of the contract must have been agreed upon and be ascertainable. . . . Furthermore, it is a well established principle of law that that which can be made certain is

certain. (Civ. Code § 3538; *Tuck v. Gudnason*, 11 Cal.App.2d 626.)

“Applying the principles above stated to the facts shown by the record it is readily apparent that there was ample evidence to support the findings of the jury. It was a business arrangement, worked out in as much detail as was then possible; the items to be included in the bottling costs were ascertained at the October meeting of the parties. All that remained was the computation thereof, which would be made at a later date when the desired data would be available, which it ultimately was.” (115.)

*Burrow v. Timmsen* (1963) 223 Cal.App.2d 283 involved the interpretation of an agreement to obtain a loan. The Court said:

“We have concluded that the agreement is not so uncertain as to be incapable of enforcement. The modern trend of the law is to favor the enforcement of contracts, to lean against their unenforceability because of uncertainty, and to carry out the intentions of the parties if this can feasibly be done. Neither law nor equity requires that every term and condition of an agreement be set forth in the contract. (*King v. Stanley*, 32 Cal.2d 584; *Martin v. Baird*, 124 Cal.App.2d 598. . . . The terms of the deferred payments are that plaintiff would execute a note for \$37,000.00, bearing 7 percent interest, and secure payment with a trust deed, payments to be made at the rate of \$300.00 per month. Defendants contend there is uncertainty due to the failure to state the time period of the note, whether the note will be negotiable, whether defendants would be en-

titled to attorney's fees in an action to collect on the note, who will be the trustee, whether there are to be covenants against waste, who has the obligations of paying taxes, what the defendants' remedies would be upon default, and what powers the trustee would have.

"We do not regard any of these omissions of detail as a defect which necessarily renders the agreement unenforceable." (288-289.)

"The essentials of the agreement are the amount of the debt and the terms of payment, including the interest agreed upon." (288-289.)

See also *Stockwell v. Lindeman* (1964) 229 Cal. App.2d 750, which held that an agreement referring to a loan not to exceed \$80,000, with interest not to exceed 7.5% and payable "at such terms and upon such conditions as are required by the lender making such construction loan" was not void for uncertainty. The Court further considered an option which described the property, the purchase price, down payment, monthly payments, interest rate and term, but which then stated: "balance of terms to be set out in (another document)." The Court noted:

"True, other items could well have been provided for, such as, whether the sale is to be on a written contract of sale or by the delivering of a deed with the seller taking back a purchase money trust deed securing the remainder of the purchase price, or whether the remainder is to be secured by a mortgage on the subject property. But none of these details are necessary or vital to its enforcement as a valid contract.

“What effect then does the addition of ‘balance of terms to be set out in said option’ have upon the enforceability of this option provision? Does it render the contract to give an option ‘through this escrow’ void and unenforceable? We conclude that it does not. If the parties to the escrow fail to agree upon any further terms, the option to be delivered in escrow need contain only the details which are spelled out since they cover the essential ingredients of an unenforceable option.” 755-756.)

**b. Absence of a schedule of maximum payments does not render the Loan Agreement unenforceable.**

On its face, the only matter which the Loan Agreement left open was an internal allocation, not the amount of the gross monthly payments to the Bank.

The Ancora agreements with Transamerica (Exhibits 4A, 4B, 4C and 4D) assigned to Transamerica, as mortgagee, all of the runs from the six Ancora wells. As previously noted, the mortgagee was authorized to retain and apply all of such runs to the Ancora obligation even if the runs exceeded the amount of the specified minimum payment.

The Loan Agreement, in paragraph 2, and in the Assignment which accompanied the transmittal of the Loan Agreement to Transamerica (Exhibit 11), incorporated by reference the assignment to the Bank of these runs and the assignment to the Bank of the rights of mortgagee under the Ancora mortgage. Paragraph 8 of the Loan Agreement noted that the designated runs were the source for repayment of the bank loan. Breakstone also testified as follows:

“Q. Were you aware that all the money coming to Transamerica in this transaction available for repayment of the bank loan would be the money coming from the Ancora promissory note (and lease)?

A. It was my understanding all of the money was to really come from the runs of the oil.

Q. And that was the money that was going to be employed to repay the bank?

A. That is correct.” (Tr 389-390.)

The Loan Agreement and the documents referred to in paragraph 2 (identified as Exhibits 21, 22 and 23) confirm in the Bank the right to receive *all* of the runs. The same documents unquestionably show the minimum monthly payment the Bank must receive. That is the essential and enforceable right.

c. The parties treated the schedule as a matter of no importance.

Consideration must be given, in determining whether a term is essential, to the apparent contractual intentions of the parties. This the Court did not do.

It is obvious that the Bank was not concerned about any schedule of maximum payments. Smith testified he didn't discuss the preparation of such a schedule with anyone. (Tr 298.) Breakstone testified that he was ready to close the loan on Monday, September 23, 1963. As of Friday, September 20, he had not prepared any schedule. Exhibit 29 was a comprehensive and detailed memorandum on the loan prepared for the Bank's files. It contains not a syllable about any such schedule.

There were two significant and lengthy telephone calls between the parties on September 19, 1963 and September 20, 1963. Exhibits 24 and 25 are transcripts of the conversations. No one breathed a word about any schedule. Breakstone, an attorney, discussed the Bank's contractual liability. He never alluded to any schedule which had been left for future agreement. In none of the contemporaneous memoranda, in none of the telephone calls, in none of the letters, in none of the communications, in none of the testimony, in nothing, is it indicated that the Bank was considering the negotiation of any schedule.

Plaintiff argued, of course, that the reason for the silence was that the schedule *had* been negotiated. It was simply the sums set out in Exhibit 22 which required only some arithmetic to produce the table attached as Schedule "A" to the Appendix to this Brief. The Court did not accept this conclusion. But the indifference of the parties to the negotiation of any schedule could only mean that the matter had been resolved (as it was) or that, as an internal allocation, it was of no consequence.

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**3. THE TRANSACTION BETWEEN THE PARTIES ON SEPTEMBER 13, 1963, WAS AN AGREEMENT NOT AN OFFER WHICH COULD BE WITHDRAWN.**

The Court categorized the proceedings on September 12, 1963, and September 13, 1963, as constituting an offer. (R 316.) The Court also categorized the Loan Agreement as the written memorial of such offer

and it therefore concluded that the Loan Agreement could be withdrawn before plaintiff assented thereto. (R 320-321.)

There was no basis for the Court's categorization and, indeed, the conclusion is opposite to what defendant itself admitted:

"The (Loan Agreement) was prepared, not to bind the plaintiff, but to bind defendant . . . . So far as plaintiff is concerned, its signature is a superfluity." (R 244, Defendant's Supplemental Memorandum of Contentions of Fact and Law.)

If the Bank, on September 13, 1963, when it said that if the engineering reports concur you have a loan, was merely making an offer, the facts show conclusively that it was accepted by plaintiff on the spot. (Tr 58.)

The Court found, as one of the terms of the alleged "offer" that "All of the terms and conditions of the contemplated loan transaction . . ." were to be reduced to writing. Defendant argues that mutual execution of the writing was therefore an indispensable condition to any contract. The contention is wrong for two reasons:

- (a) The evidence does not support the finding.
  - (b) There is no finding that the parties did not intend to be bound in the absence of a writing.
- a. The writing was first discussed after the agreement was made.

The only evidence with respect to the preparation of a written agreement was that of Breakstone. He

said that *after* Siegel had committed the Bank to the loan, then Breakstone discussed closing mechanics with plaintiff and at that time said there would have to be a loan agreement. (Tr 380.)

It is obvious from the context that the writing was to be a written memorial of the existing oral understanding.

Moreover, as the Court repeatedly noted, Breakstone had no independent authority to make any agreements for Bank.

“The Court: It is all right. Counsel, I think it is unimportant. This man is not the man who set the condition. All this man does is review the documents. Your client knew it.” (Tr 389.)

The essence of plaintiff's case is that after all of the essential matters had been reviewed by Smith and Breakstone and presented to the Bank's senior executive vice-president who had authority to bind the Bank, the Bank agreed to make the loan. Subsequent comments by Breakstone, the Bank's attorney, who had no authority to bind the Bank did not change the oral agreement.

- b. **Even if parties intend to reduce their agreement in writing they can be bound to their contract without the writing.**

The Court's position seems to be based on the notion that if the parties to an oral agreement intend to reduce their agreement to writing then, until the writing is duly executed, the oral agreement merely has the status of an offer. This is not the law.

In *American Aero. Corp. v. Grand Central Aircraft Co.* (1957) 155 Cal.App.2d 69, the Court noted:

“It was part of the understanding of the parties that their oral agreement should be reduced to writing, signed by them, and delivered. The oral agreement, as made, was not reduced to writing. New terms were added in the writing, and it was never signed by American or delivered. The result was that the oral agreement remained binding (*Johnson v. 20th Century-Fox Film Corp.*, 82 Cal.App.2d 796, 820 [187 P2d 474]; *Columbia Pictures Corp. v. DeToth*, 87 Cal.App.2d 620, 629 [197 P2d 580]), and the proposed written contract was of no force or effect.” (82-83.)

In *Columbia Pictures Corp v. DeToth* (1948) 87 Cal.App.2d 620, 197 P.2d 580, the Court said:

“The cases are legion to the effect that when the respective parties orally agree upon all of the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the oral agreement. . . .

“It is, of course, likewise the law that if it is the intention of the parties that before a contract shall exist between them, the terms of the contract are to be reduced to writing and signed by them, a complete or binding contract does not arise until a writing evidencing the terms of the agreement has been executed. . . .

“Whether it was the mutual intention of the parties that the oral agreement should be binding *eo instante* is to be determined by the surrounding

facts and circumstances of a particular case and is a question of fact for the trial court.” (629.)

In the present case, of course, the Court never did make a determination whether there was an oral agreement because, through its error in applying the Statute of Frauds, it never reached that issue.

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**4. NONPERFORMANCE BY PLAINTIFF OF ANY CONDITIONS PRECEDENT WAS EXCUSED BY DEFENDANT'S BREACH.**

The Court determined, as a purported finding of fact, that two conditions precedent to the contract had not been performed. (R 319, 320.) The first condition was that the Schafer report “concur” with the Fiedorek report. The second condition was that Bank be furnished with an approving title opinion.

On September 19, 1963, the Schafer report was not complete and it neither concurred nor failed to concur with the Fiedorek report. (Tr 267-270.) On September 19, 1963, the Alabama attorney reviewing title was in the process of preparing his opinion. Closing was scheduled for September 23, 1963. (Tr 60.)

Before the work required to meet either condition could be completed, defendant gave notice that it would not make the loan “under any circumstances”. (Tr 358; Exhibit 29.) The Court expressly found that:

“At all times since September 20, 1963, defendant has failed and refused to make the contemplated loan to plaintiff.” (R 319; Finding XVI.)

Since the Bank gave notice of its refusal to make the loan on September 19, 1963, plaintiff's obligation to perform the conditions precedent on September 23, 1963, was excused.

As noted by *Williston on Contracts* (2d Ed.) Sec. 699:

“It is an old maxim of the law that it compels no man to do a useless act, and this principle has been applied to the case of a conditional promise. If the promisor is not going to keep his promise in any event, it is useless to perform the condition and the promisor becomes liable without such performance. So if before the time for the performance of a condition by a promise, the promisor leads the promisee to stop performance by himself manifesting an intention not to perform on his part, even though the condition is complied with, ‘it is not necessary for the first to go further and do the nugatory act.’”

See: *Rice v. May* (9th Cir. 1956) 231 Fed.2d 389.

The Court failed to recognize that performance could be excused by defendant's breach.

“The Court: Don't you have to show that your client was ready, willing and able to perform the conditions?”

Mr. Lempert: Yes.

The Court: Or that they were (excused)?

Mr. Lempert: We showed both of those things, your Honor.

The Court: The fact that the bank did not perform is not an excuse for your proceeding.

Mr. Lempert: The fact that the bank gave us notice of anticipatory breach then . . . would have

excused our condition to proceed. Moreover, the actual time for performance being on the 23rd, Mr. Riddick did not go forward to consummate the things he was working on on the 19th and the 20th. Up to that time he had received all the title opinions from other counsel. He had been instructed to get a release from Jett and it appeared he was getting a release from Jett. There was no reason to believe he could not deliver the opinion on the 23rd. He wasn't asked to because it didn't take place on the 23rd.

The Court: It is your lawsuit, not mine." (Tr 201-202.)

The Court erred, and as a result of its error of law, it made an improper finding. It should have held, consistently with its finding XVI, that performance of the conditions by plaintiff on September 23, 1963, was excused by defendant's prior refusal to proceed.

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##### 5. CERTAIN FINDINGS WERE GROSSLY ERRONEOUS.

###### a. Finding XI(a):

The finding that a term of the "offer" was that the writing constitute the agreement is improper for the reasons set forth in paragraph 3(a) of this Brief.

###### b. Finding XIV:

The finding that the parties *expressly reserved* "terms and conditions" of the loan for future agreement is wrong.

As noted in paragraph 2 of this Brief, there was only one term in the Loan Agreement which was "ex-

pressly" reserved for future agreement. Evidence was introduced to show that in fact the reference was actually to an allocation between the two notes. (Tr 79; 384.) It was shown that the Bank had the option to select whether the compensating balance note would be paid in 42 equal installments or in 42 declining installments. Until the choice was made it was not practical to compute the monthly payments allocable to the \$600,000 note although the total required monthly payments would remain constant. On September 18, 1963, Bank made its election to have the compensating balance note paid in equal installments. (Exhibit 11.) The schedule then became a matter of pure arithmetic computation as set forth in Schedule A in the Appendix.

Breakstone and Smith both testified that they had no objections to the mortgages, assignments, leases and other documents, which expressly included the precise minimum monthly amounts to be paid. Breakstone testified that on September 12, 1963, he thought there *might* have to be some changes or interlineations. (Tr 367.) On September 13, 1963, the loan was passed upon by the Bank's authorized officer and there was no further reference by anyone as to any possible changes or interlineations.

**c. Finding XVII:**

The finding that the Schafer report did not concur with the Fiedorek report is unsupportable. The evidence was that Schafer did not complete his report and that he had no opinion whether it concurred or

did not concur. (Tr 270.) No one could determine whether there was nonconcurrence because the report was never finished.

**d. Finding XI(b):**

The finding that Schafer's report was required to satisfy the Bank's loan standards is totally unsupported nor fairly deductible from the Loan Agreement. Schafer's report was only intended as a "me too" report (Tr 255), which was to concur or not concur in the Fiedorek report. The Fiedorek report had already been evaluated and that report met the Bank's lending standards. (Tr 281-282, 285-286, 336-337.) The Bank's standards did not change. If the Schafer report concurred in the Fiedorek report there was no basis for further analysis of the Bank's standards. The language used in the Loan Agreement only defines the effect of concurrence. It does not set up a new standard which Schafer's report was required to meet.

**e. Finding XIX:**

The Court made a finding that there was no binding agreement between Transamerica and Ancora. This was not an issue litigated in the case. The Court had announced early in the trial that it would not consider any consequential damages arising out of other agreements or business relationships. (Tr 189.)

There was evidence that on September 13, 1963, Chipman told Bank that he was not "personally committed" to Ancora. (Tr 378.) When the same point was stated more generally in a fashion that might have applied to Transamerica there was an objection:

“Mr. Smith: In view of the way he appeared either Breakstone or myself, I can’t remember which, asked him if he were working under a commitment to Ancora. He answered no.

Mr. Lempert: May that be stricken, your Honor? I do not see the relevancy of that in any way, shape or form as to whether or not Mr. Chipman’s legal conclusion as to whether or not he had a commitment or not has any bearing on this particular action.

The Court: I consider it admissible as to the frame of mind of Mr. Chipman as to the relationship with Ancora.” (Tr 317.)

Exhibit 2 is clear evidence that notwithstanding what Chipman’s state of mind might have been, there was a binding agreement between Transamerica and Ancora.

**f. Finding XI:**

The Court’s finding that the events on September 13, 1963, merely constituted an offer were discussed in paragraph 3 of this Brief. The determination is unsupported and, at best, is based on a mistaken view of the extent to which the Court could consider the oral agreement.

**g. Finding IX:**

The finding relates to the content of Exhibit 16 which sets forth a repayment schedule per well. The finding misreads some of the content of the letter in that it sets forth 44 of the 48 Ancora lease and note payments rather than 42 of the 48 payments.

# **h. Finding XV:**

The finding that the repayment schedule incorporated in the documents could not repay the contemplated bank loan is utterly mistaken.

Schedule "A" in the Appendix shows how the loan is repaid pursuant to the *minimum* payment schedule. There is a balloon requirement of about 11½% at the end of the term. It is obvious this small amount is within the contemplated range of the runs which would be received by the Bank over the minimum and either allocated to the note or to the reserve.

According to the Fiedorek report, which the Bank had received, reviewed and approved before preparation of the Loan Agreement, and upon which the parties predicated their computations, the oil runs, during the years September 1, 1963, to September 1, 1967 (48 months), were estimated to total \$850,840, as follows:

<u>Year Beginning September 1</u>	<u>Gross Revenue After Production Taxes</u>
1963	\$339,063
1964	238,791
1965	160,669
1966	112,417
	<hr/>
	\$850,940

(Exhibit 5, p. 3, column 4.)

Fiedorek noted that in order to determine the runs for 42 months the runs for the last year are prorated. The total for such period was about \$795,000. (Tr 249.) The income thus estimated by Fiedorek, upon which the Loan Agreement was predicated, substan-

tially exceeded the amount required to service the contemplated bank loan (\$669,049).

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## VI

**CONCLUSION**

The Court misapplied the law in construing the oral agreement of the parties and misconstrued the language and effect of the written Loan Agreement.

Wherefore, plaintiff respectfully requests that the judgment of the Court below should be reversed.

Dated, San Francisco, California,

July 24, 1968.

Respectfully submitted,

ARTHUR J. LEMPert,

*Attorney for Appellant.*

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**CERTIFICATE OF COUNSEL**

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and, in my opinion, the foregoing brief is in full compliance with these rules.

ARTHUR J. LEMPert,

*Attorney for Appellant.*

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**(Appendix Follows)**



## Appendix



# SCHEDULE A

## MINIMUM REPAYMENT SCHEDULE

Total Payment	Applied to \$11,550 Note	Net Payment	Applied to \$600,000 Note		
			Principal	Interest	Bala
22,920	\$275	\$22,645	\$19,145	\$3,500	\$580,
22,920	275	22,645	19,257	3,388	561.
22,920	275	22,645	19,369	3,276	542,
22,920	275	22,645	19,482	3,163	522,
22,920	275	22,645	19,596	3,049	503,
20,190	275	19,915	16,980	2,935	486,
20,190	275	19,915	17,079	2,836	469,
20,190	275	19,915	17,179	2,736	451,
20,190	275	19,915	17,279	2,636	434,
20,190	275	19,915	17,380	2,535	417,
20,190	275	19,915	17,481	2,434	399,
17,820	275	17,545	15,223	2,332	384,
17,820	275	17,545	15,302	2,243	369,
17,820	275	17,545	15,391	2,154	353,
17,820	275	17,545	15,481	2,064	338,
17,820	275	17,545	15,571	1,974	322,
17,820	275	17,545	15,662	1,883	307,
15,780	275	15,505	13,713	1,792	293,
15,780	275	15,505	13,793	1,712	279,
15,780	275	15,505	13,874	1,631	265,
15,780	275	15,505	13,955	1,550	251,
15,780	275	15,505	14,036	1,469	237,
15,780	275	15,505	14,118	1,387	223,
13,992	275	13,717	12,412	1,305	211,
13,992	275	13,717	12,485	1,232	198,
13,992	275	13,717	12,558	1,159	186,
13,992	275	13,717	12,631	1,086	173,
13,992	275	13,717	12,705	1,012	160,
13,992	275	13,717	12,779	938	148,
12,450	275	12,175	11,311	864	136,
12,450	275	12,175	11,377	798	125,
12,450	275	12,175	11,444	731	113,
12,450	275	12,175	11,510	665	102,
12,450	275	12,175	11,577	598	90,
12,450	275	12,175	11,645	530	79,
11,070	275	10,795	10,333	462	68,
11,070	275	10,795	10,393	402	58,
11,070	275	10,795	10,454	341	48,
11,070	275	10,795	10,515	280	37,
11,070	275	10,795	10,576	219	26,
11,070	275	10,795	10,638	157	16,
16,681	275	16,406	16,311	95	-
	\$11,550	\$669,049	\$600,000	\$69,049	



SCHEDULE B

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